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ONTARIO LAW REPORTS.

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CASES DETERMINED IN THE COURT OF APPEAL  
AND IN THE HIGH COURT OF JUSTICE  
FOR ONTARIO.

1913.

7/11/16

REPORTED UNDER THE AUTHORITY OF THE  
LAW SOCIETY OF UPPER CANADA

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VOL. XXVII.

EDITOR:  
EDWARD B. BROWN, K.C.

TORONTO :  
CANADA LAW BOOK COMPANY, LIMITED,  
LAW BOOK PUBLISHERS,  
32-34 TORONTO ST.

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1913

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JUDGES  
OF THE  
COURT OF APPEAL  
DURING THE PERIOD OF THESE REPORTS.\*

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THE HON. SIR CHARLES MOSS, C.J.O.\*

- “ “ JAMES THOMPSON GARROW, J.A.  
“ “ JOHN JAMES MACLAREN, J.A.  
“ “ RICHARD MARTIN MEREDITH, J.A.  
“ “ JAMES MAGEE, J.A.  
“ “ FRANK EGERTON HODGINS, J.A.

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\*Sir Charles Moss died on the 11th October, 1912. The cases in this volume, according to the dates of the decisions, range from the 28th June, 1912, to the 15th January, 1913. On the 1st January, 1913, the Law Reform Act, 1909, 9 Edw. VII. ch. 28, came into force. The changes in the names and composition of the Courts made by that Act do not affect any of the cases reported in this volume. See the memorandum, *post* vii., as to the appointment of Judges.



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# JUDGES

OF THE

## HIGH COURT OF JUSTICE

DURING THE PERIOD OF THESE REPORTS.

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### *King's Bench Division.*

THE HON. SIR GLENHOLME FALCONBRIDGE, C.J.K.B.  
“ “ BYRON MOFFATT BRITTON, J.  
“ “ WILLIAM RENWICK RIDDELL, J.

### *Chancery Division.*

THE HON. SIR JOHN ALEXANDER BOYD, C., K.C.M.G.  
“ “ FRANCIS ROBERT LATCHFORD, J.  
“ “ WILLIAM EDWARD MIDDLETON, J.

### *Common Pleas Division.*

THE HON. SIR WILLIAM RALPH MEREDITH, C.J.C.P.  
“ “ JAMES VERNALL TEETZEL, J.  
“ “ HUGH THOMAS KELLY, J.

### *Exchequer Division.*

THE HON. SIR WILLIAM MULOCK, C.J.Ex.D., K.C.M.G.  
“ “ ROGER CONGER CLUTE, J.  
“ “ ROBERT FRANKLIN SUTHERLAND, J.

### *Unattached.*

THE HON. HAUGHTON LENNOX, J.  
“ “ JAMES LEITCH, J.

## ERRATA

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Page 2, 4th line from bottom, for "Perry" read "Terry."

" 193, 4th line from top, and p. 202, 18th line from bottom, for "*Taylor, Phillips, and Rickards' Cases*" read "*Massey and Giffin's Case*;"  
p. 193, 5th line from top, and p. 202, 17th line from  
bottom, for "298" read "582."

" 196, 3rd line from bottom, and p. 199, 8th line from top, for [1907]  
read [1897].

Pages 257, 258. The appeal was by the defendants Hitch & Co., not by the  
plaintiffs.

Page 445, 9th line from bottom, and p. 447, 2nd line from bottom, for  
"304" read "204."

" 460, 18th line from bottom, for "15 L.T.R." read "57 L.T.R.;" and  
15th line from bottom, for "358" read "356."

" 551, 7th line from bottom, and p. 554, last line, for "ch. 60" read  
"ch. 61."

# MEMORANDA

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## APPOINTMENT OF JUDGES

On the 1st November, 1912, The Honourable Sir William Ralph Meredith, Chief Justice of the Common Pleas, was appointed Chief Justice of the Court of Appeal for Ontario, with the style or title of Chief Justice of Ontario, in the room and stead of The Honourable Sir Charles Moss, deceased.

On the same day, The Honourable Richard Martin Meredith, a Justice of Appeal of the Court of Appeal for Ontario, was appointed Chief Justice of the Common Pleas Division of the High Court of Justice for Ontario, with the style or title of Chief Justice of the Common Pleas, in the room and stead of The Honourable Sir William Ralph Meredith, promoted to be Chief Justice of Ontario.

On the same day, Frank Egerton Hodgins, of the City of Toronto, in the Province of Ontario, Esquire, one of His Majesty's Counsel, was appointed a Judge of the Supreme Court of Judicature for Ontario, and a Judge of the Court of Appeal for Ontario, with the style or title of Justice of Appeal, in the room and stead of The Honourable Richard Martin Meredith, promoted to be Chief Justice of the Common Pleas.

On the same day, James Leitch, of the City of Toronto, in the Province of Ontario, Esquire, one of His Majesty's Counsel, was appointed a Judge of the Supreme Court of Judicature for Ontario, and a Justice of the High Court of Justice for Ontario (not attached to any Division of the High Court).

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## CALL TO THE BAR

In Easter Term, 1912, the following gentlemen were called to the Bar:—

Arthur Campbell Craig, Frederic Charteris Carter, Alfred Ernest Day, Alexander Æneas McDonald, Frank Gordon Mackenzie, William Humphrey Clipsham, Wesley Andrew Goetz,

Cecil Vanroy Langs, Stanley Stuart Mills, Joseph Avila Paul Labelle, John Harold Lloyd Morgan, George Edmund Newman, Gordon Daniel Conant, Charles Bevers Scott, Clifton Medley Johnston, John A. Campbell, William Pope Clement, Henry Everyll Bowen Coyne, William Duncan Herridge, Thomas Basil Malone, Edward Gordon McMillan, Arthur Lawrence McGovern, Edward Hamilton Lancaster, Moore Armstrong Miller, Jean Justin Bernadin Boutet.

In Trinity Term, 1912, the following gentlemen were called to the Bar:—

James Miles Langstaff (with Honours and Gold Medal and Chancellor Van Koughnet Scholarship), Archibald Cochrane, Bernard Collins, William George Jackson (with Honours), Montalieu Nesbitt, LeRoy Eaton Awrey, Welbern Graham Atkin, John Boyd Hopkins, Philip Grattan Kiely, Daniel Western O'Sullivan, Thomas Hamilton Simpson, Charles Watson Widdifield, Vernon Joseph Callen, William Cedric Davidson, George Reece Kappeler, George Keogh, Hedley Clark Macklem, George Francis Rooney, Stanley Howard Slater, Hyacinthe Reinhold Valin, Francis James Foley, William Vincent Carey, Norman Baillie Wormwith, John Charles McKay MacBeth, James Henry Oldham, Herbert Bethune Daw, Alexander Murray Garden, Arthur Burgess Turner, John Hylton Cavell, John Cowan junior, Hugh Percival Adams Edge, Maurice James Folinsbee, Howard Kilbourne Harris, Hugh Leonard O'Rourke, Edgar Fraser Raney, Ephraim Frederick Singer, John Richard Corkery, Harry VanWyck Laughton, Clarence Lorne Fraser, George Gilbert Thrasher.

In Michaelmas Term, 1912, the following gentlemen were called to the Bar:—

Arthur Ernest Langman, Delbert Lisle Constable, Malcolm Keith Lennox, Douglas William Cooper, Robert Smith, Clarence Morton Scott, Cecil Roy Burroughs, Hugh William Bethune, John Othmar Robinson, Kenneth Langdon (special).

In Hilary Term, 1913, the following gentlemen were called to the Bar:—

Samuel Cameron Arrell, James Henry Fraser.

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# REPORTS OF CASES

DETERMINED IN THE

## COURT OF APPEAL

AND IN THE

## HIGH COURT OF JUSTICE FOR ONTARIO.

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[IN THE COURT OF APPEAL.]

MERRITT V. CITY OF TORONTO.

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June 28.

*Water and Watercourses—Marsh Lands—Passage over Adjacent Lands—Access to Deep Water—Proprietary and Riparian Rights—Ashbridge's Bay—Evidence.*

The judgment of a Divisional Court, 23 O.L.R. 365, was affirmed; MACLAREN, J.A., and CLUTE, J., dissenting.

*Per* MOSS, C.J.O.:—Upon the evidence, and without the aid of what is recorded in the publications referred to by MIDDLETON, J., in the Court below, the plaintiff's property, comprised within the conveyances and grants under which he claims, is now and always has been marsh, and nothing but marsh; and between it and the artificial channel through which he seeks access as riparian owner there is land of a like character.

*Per* MEREDITH, J.A.:—The statements contained in local private publications, relied on in the Court below, were not evidence. But, upon the whole evidence adduced at the trial, it was impossible to find that the waters to which the plaintiff's land extended were navigable; and the onus of proof that they were was upon the plaintiff.

APPEAL by the plaintiff from the judgment of a Divisional Court, 23 O.L.R. 365.

November 15, 1911. The appeal was heard by Moss, C.J.O., MACLAREN and MEREDITH, JJ.A., and CLUTE and SUTHERLAND, JJ.

*H. M. Mowat*, K.C., for the plaintiff. The plaintiff has a patent for land "to the water's edge," and also for land outside of that, and the Court below erred in holding that the plaintiff was not the owner of land covered by water, and entitled to the

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rights of a riparian proprietor. The evidence shews that Ashbridge's Bay is a part of the Harbour of Toronto, and that the plaintiff bought on account of the riparian rights to which he claims to be entitled. The evidence further shews that, as a matter of fact, the bay was navigable, and that a great extent of the beach was clear, except where there were bits of floating bog that any one could easily move away. There was no "marsh hay" in front of the plaintiff's land, but only this species of aqueous growth which would float away, and did not deprive the water of its navigable quality. He referred to *Hood v. Toronto Harbour Commissioners* (1873), 34 U.C.R. 87, and to the Lake Scugog case, *Beatty v. Davis* (1891), 20 O.R. 373, which is the leading case on the subject, and which, it is respectfully submitted, is not successfully distinguished by the learned Chancellor from the case at bar. He also referred to a number of cases cited in the previous argument, 23 O.L.R. at p. 366, and to *Esson v. McMaster* (1842), 3 N.B.R. 501.

*H. L. Drayton*, K.C., and *G. A. Urquhart*, for the defendants, argued that the plaintiff was not a riparian proprietor, and had no rights as such. The plaintiff's rights are held under patent from the Ontario Government only; and if, as maintained by him, the marsh is navigable water, his patent is inoperative. As a matter of fact, however, the appellant's property has never been used for navigation purposes, and is incapable of being so used. In any case, the defendants' works do not obstruct navigation, and have caused no damage to the plaintiff. We have not blocked his entrance and have improved the general right of way. They referred to *Ross v. Village of Portsmouth* (1866), 17 C.P. 195, *per* Wilson, J., at p. 203; *Ratté v. Booth* (1886), 11 O.R. 491, *per* Boyd, C., at p. 498; S.C. (1887), 14 A.R. 419, *per* Patterson, J.A., at p. 432; *Orr Ewing v. Colquhoun* (1877), 2 App. Cas. 839; *The Queen v. Meyers* (1853), 3 C.P. 305; *Baldwin v. Erie Shooting Club* (1901), 127 Mich. 659, 660-662; *The Queen v. Robertson* (1882), 6 S.C.R. 52; *Attorney-General v. Perry* (1874), L.R. 9 Ch. 423, *per* Jessel, M.R., at p. 425n.

*Mowat*, in reply, argued that *Ross v. Village of Portsmouth*, *supra*, turned on a different state of facts, as there it was a question of a wadable stream. *Beatty v. Davis* is conclusive in

the plaintiff's favour. There is no doubt as to his *bona fides*, and he should be given the benefit of any doubt that may exist in the matter.

June 28, 1912. Moss, C.J.O.:—Appeal by the plaintiff from a judgment of a Divisional Court affirming the judgment of Magee, J., after trial without a jury, dismissing the action.

So far as the facts of the case are concerned, it is unfortunate that, owing to the accidental destruction of the stenographer's notes of the testimony on behalf of the defendants, there is no complete transcript of the evidence in the case, and the only record of that part of the testimony is furnished by the notes of the learned trial Judge. However, the testimony bearing on the question of the nature of the plaintiff's property and the navigability or supposed navigability of the waters of Ashbridge's Bay has been noted with very considerable fulness and detail.

And it is proper to assume that, in determining the issues, the learned Judge gave due and proper weight to that evidence, so far as it is opposed to the evidence adduced on behalf of the plaintiff.

The plaintiff rests and can only rest his case against the defendants upon such rights as he has under the grant to him of what is designated the lot covered with water extending south to the property granted to the defendants by the two several patents in the case. And it was incumbent upon him to shew, not only that the waters of Ashbridge's Bay were navigable in the sense in which that quality is to be found in order to confer riparian rights of the kind claimed, but also that his property did in fact border upon the waters. If that which intervenes between his dry land fronting on Eastern avenue and the north limit of the defendants' property has always been marshy, boggy land, and the defendants' property for some distance south of the north limit has always been of the same nature, there is nothing in the respective grants and conveyances to turn them into water lots.

Upon the best consideration I have been able to give to the testimony, and without the aid of what is recorded in the publications referred to by Middleton, J., I come to the same con-

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clusion as the Chancellor, viz., that the plaintiff's property, comprised within the conveyances and grants under which he claims, is now and always has been marsh, and nothing but marsh; and that between it and the artificial channel through which he seeks access as riparian owner there is land of a like character.

Present appearances, after so much has been done by means of dredging and channelling to create a condition of open water, afford no index to the condition in early days of the waters of the Ashbridge's Bay marsh and of the lands bordering upon them. But, whatever the conditions may have been at the easterly part, the testimony makes it plain that there always was bog and marsh to the west in front of the property now claimed by the plaintiff, and that its character has undergone but slight change, though liable, of course, to some changes in appearance and wetness according as the year or season was a wet or dry one.

Upon the whole, I am unable to say that the conclusion of the Divisional Court is erroneous; and I would, therefore, dismiss the appeal.

SUTHERLAND, J., agreed with MOSS, C.J.O.

MEREDITH, J.A.:—The only right which the appellant contends for here is a right of navigation; no other rights, riparian or otherwise, are set up. The question, and the only question, therefore, is, whether the waters, in front or at the back, whichever any one may choose to call it, were, at the time of the acts of the defendants complained of, navigable: entirely a question of fact.

The trial Judge adjudged that they were not: but, unfortunately, he gave no reasons for his conclusion; and we are, therefore, without any assistance from him in now considering the question. A Divisional Court, upon an appeal from him to them, affirmed his judgment; but, unfortunately, did so, largely, upon statements contained in local private publications, which were not evidence, and which were not attempted to be put in as evidence by either party, or indeed even mentioned, upon the trial, or upon the argument before it; so that that judgment is



vitiated and cannot stand, nor can it afford much assistance upon this appeal.

But, upon the whole evidence adduced at the trial, it is quite impossible for me to find that the waters to which the plaintiff's land extended were navigable; and the onus of proof that they were is, of course, upon the plaintiff. It may very well be that at no very great cost a channel, sufficient for small boats, might have been made, giving access from the plaintiff's land to navigable waters of the bay—through shallows, reeds, and other obstructions—but no such right appertained to the land. Those who are familiar with the marshes along the great lakes, and connecting rivers, which bound this Province to a great extent, can have no great difficulty in understanding the evidence and reaching the conclusion that the plaintiff's land did not extend to navigable marsh waters: see *Niles v. Cedar Point Club* (1899), 175 U.S. 300, and *Ross v. Village of Portsmouth*, 17 C.P. 195.

It cannot make much, if any, difference what causes the obstruction to navigation, or whether or not it is in any sense a floating obstruction, so long as it destroys navigability, and is permanent, or there be no right, in the land-owner, to compel its removal, or to a way through it.

I would dismiss the appeal.

CLUTE, J.:—Appeal from the Chancery Division dismissing the appeal from the trial Judge, who dismissed the action with costs.

The plaintiff is the owner of certain land in the city of Toronto, having a frontage of 166 feet 3 inches on Eastern avenue, with a depth of 265 feet, which is alleged to extend to the water's edge, hereafter referred to as the "land lot."

He also owns a strip of land covered with water, of the same width, to the south of the land lot, and extending on the westerly side 596 feet 7 inches, and on the easterly side 546 feet 6 inches, and containing  $2\frac{11}{100}$  acres, to the northerly limit of lands owned by the City of Toronto, hereafter referred to as the "water lot."

The plaintiff claims riparian rights in respect of the land lot, and charges that the defendants have interfered with those

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rights by digging a canal through their property and throwing the earth excavated therefrom on the north side of the canal adjoining the plaintiff's property, and thereby shutting him off from access to the navigable waters of Ashbridge's Bay. This he claims to be contrary to the distinct understanding between the city, himself, and other owners of land fronting on Ashbridge's Bay, and that, in violation of such understanding between the parties, they registered a plan of the proposed work without recognising the riparian rights of the plaintiff. The plaintiff asks for a mandamus to compel the defendants to amend the plan by reserving the riparian rights of the plaintiff and to compel the defendants to remove the obstructions placed in front of the plaintiff's land, and an injunction to restrain the defendants from interfering with the rights of the plaintiff, and for damages and other relief.

The defence denies the plaintiff's title, or that he ever had any riparian rights in respect of his lands, claims a binding agreement which debars the plaintiff of all claim or right to cross the defendants' land, and claims under grant from the Province of Ontario up to the line so settled, and, in the alternative, under Dominion grant, and that the plaintiff's claim, if any existed, was by arbitration under sec. 437 of the Consolidated Municipal Act, 1903, and is barred by sec. 438 of the same Act, more than a year having elapsed since damages were sustained, and that the defendants' work was for the public benefit.

The trial Judge, Magee, J., gave no written opinion, but endorsed on the record a simple dismissal of the action. An appeal was taken to the Divisional Court. The Chancellor there states, 23 O.L.R. 367, that the action was dismissed by the trial Judge on the ground that the plaintiff's property was land, and not water, and that he was not in any sense a riparian proprietor. The Chancellor in his judgment says that "the plaintiff's land is now, and always has been within historical memory, marsh and nothing but marsh;" and that "the law of the case is that law which pertains to the ownership of marsh land." Middleton, J. (p. 372), was of opinion that the rights of the parties are the rights of adjoining proprietors, and that no ques-

tion of riparian or water rights arises. "Each owner may reclaim or may ditch as he sees fit, but neither has any right over the lands of the other. This swamp was not such a body of water as either has the right to have maintained. It is, in truth, no more than a wet parcel of land where reeds and brushes grow, upon which marsh hay is cut, and this must be regarded as land, and not water." The appeal was dismissed, Riddell, J., agreeing in the result.

The plaintiff claims ownership to the "land lot" by a certificate of ownership under the Land Titles Act, dated the 26th November, 1890. This description on the east is to the water's edge. It does not follow the water's edge, however, but proceeds westerly parallel with Eastern avenue. The water line (or swamp, whichever it be) encroaches on the south-westerly portion of the lot, so that the whole front of the land lot touches the water (or marsh) on its southerly boundary.

The plaintiff's title to the "water lot" is by grant from the Crown dated the 3rd December, 1889, and is described as  $2\frac{7}{100}$  acres of land covered with water, and may be known as follows. The description then is: "Commencing at a point on the water's edge of Ashbridge's Bay," the point being the south-western corner of the "land lot;" "thence south 16 degrees east 596 feet 6 inches more or less to the northern limit of the property of the Corporation of the City of Toronto, as patented to them on the 18th May, 1880; thence north 56 degrees 40 minutes 15 seconds east along said limit to a point where a line drawn parallel to the limit between township lots Nos. 11 and 12 and distant 297 feet measured westerly thereupon and at right angles thereto will intersect the said lot; thence north 16 degrees west 546 feet 7 inches more or less to the water's edge"—that is, to the south-east corner of the "land lot"—"thence south 74 degrees west parallel to Eastern avenue, *and along said water's edge* 160 feet 3 inches to the place of beginning." The grant is made upon the condition and undertaking that, should any claim be made in respect of the premises by the Government of Canada, the grantee shall not be entitled to claim compensation from the Ontario Government. The Crown also reserves "the free use, passage, and enjoyment of, in, over, and upon any navigable

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waters that shall or may be hereafter found under or be flowing through or upon any part of the said parcel or tract of land covered with water hereby granted as aforesaid."

The grant to the City of Toronto, referred to in the plaintiff's patent, describes the land as that certain parcel or tract of *marsh land and land covered by water* containing by computation 1,385 acres, more or less, reserving the right of passage over all navigable waters "that shall or may hereafter be found on or under or be flowing through or upon any part of the said premises hereby granted," and also reserving all rights of fishery and free access to the shores of Lake Ontario and the Bay of Toronto.

The defendants also claim by grant from the Dominion Government dated the 10th October, 1903. The consideration mentioned is \$20. The patent recites "that whereas the lands hereinafter described form part of a public harbour vested in His Majesty as represented by the Government of Canada;" and the lands are described as "all and singular that parcel of marsh land and land covered by water in the city of Toronto, reserving the free use and passage and enjoyment over all navigable waters that shall or may be found on or under or be flowing through or upon any part of the lands thereby granted."

A large number of witnesses were examined as to the extent the lands of the plaintiff and the city were covered with water, and whether the waters covering such lands were navigable. What is known as Ashbridge's Bay is made up of portions of open water and land covered or partly covered with water, through which have grown reeds and marsh grass. A portion of this so-called land covered with water is a floating vegetable mass, with clear water between it and the solid ground. Large portions of this floating mass would from time to time, under strong winds, drift away; and one old resident, Mr. Leslie, stated that he remembered one occasion when the whole floating mass had drifted off to the south of the bay, leaving the shore line from this place to the east of the plaintiff's "land lot," and so along the west shore to Carlaw avenue, entirely free from marsh grass, and the water clear. This probably was an innocent exaggeration, although the evidence does clearly

establish that sometimes very large portions of this floating mass of vegetable matter would move across the bay under heavy winds. It does not follow that, if the lands referred to are not navigable for large or small craft or at all, the plaintiff has no riparian rights. If it be "land and nothing but land," doubtless the plaintiff has no claim; but, if it be land between high and low water mark, different considerations arise.

After much negotiation, the city and the owners of lands along the water's edge, including the plaintiff's predecessor in title, agreed upon a conventional line, known as the "Unwin line." It was, no doubt, expected and intended at the time that the various owners should be recognised as owners down to the boundary line of the property conveyed to the city; but the Ontario Government, claiming for the Crown the land between the water's edge and open water, granted to the city the part south of the conventional line, and to the plaintiff and others the land north thereof; and it is a matter worthy of note that the plaintiff's patent describes the "water lot" as covered with water, referring to it "as being composed of water lot in front of part of lot No. 12, broken front concession from the bay." It recognises the southern limit of the plaintiff's "land lot" as being "a point on the water's edge of Ashbridge's Bay," and the reservation contained in the grant, in respect of the free use "of all navigable waters," leads one, I think, fairly to the conclusion that both the Government and the purchaser considered the "water lot" in question land covered with water, and not simply land.

The evidence clearly shews that immediately in front of the "land lot" there is, even in comparatively low water, open water, which at times varies from 16 inches in low water to 2, 3, and even 4 feet deep in high water.

This depth of water extends at all events from the "land lot" 30 to 40 feet, where, it would appear, for some distance the water is not so open and not so deep.

Hay has been cut over the lands immediately to the east for many years, and probably to a certain extent over the "water lot" in question, but this is not so clear.

In cutting the hay the men waded through the water, vary-

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ing in depth in the different seasons; and, beneath this "crust" formed of rotted vegetable matter, there was clear water that, in some places, in breaking through, would take a man up to his neck.

In high water over a large part, if not all of this area, a boat could pass and did pass; the fishers and hunters passed over it in that way in fishing and hunting; but it was not navigable for boats of any considerable size over this "water lot" except in high water.

In making the soundings for the works of the defendants complained of, the engineer found clear water beneath the "crust" along the boundary line of the city property and for 30 to 50 feet to the north, as far as they sounded it.

I think, therefore, that the lands included in the plaintiff's "water lot," and in the similar lands to the south of the defendants' line to the open water of the bay, may be properly described as lands between high and low water mark—with this further fact that, beneath this vegetable "crust" formed by decayed vegetable matter, there was clear water. This space between the crust and the bottom proper was taken into account by the defendants' engineers in ascertaining the amount of the excavations to be allowed the contractors.

In order to ascertain whether the plaintiff is a riparian proprietor, and if so what are his rights, it will be necessary to consider the effect of the grant of which his land forms a part, and also in what way, if any, his rights were affected by the conventional line now separating the property of the plaintiff and the defendants.

The township lot is described as being composed of lot No. 12 in the first concession with broken front east of the River Don, in the township of York, with all the woods and waters thereon lying, beginning at a post in front marked 12/13; thence north 16 degrees west 125 chains; thence north 74 degrees east 20 chains; thence south 16 east *to the front*; thence westerly *along the front* to the place of beginning, with allowance for roads. What does "the front" in this description mean? It was clearly established by the evidence that there was open water at the south-east corner of lot 12, and a wharf



known as Leslie's wharf was built on lot 11 at that place, and used for many years for receiving and shipping wood and other freight, and that there was open navigable water from the wharf both into Toronto Bay and Lake Ontario. I think the word "front," therefore, means the water's edge, and the line follows along the front or water's edge from the point between 11 and 12 westerly to the place of beginning. If the water's edge of Ashbridge's Bay were not navigable, this description would carry the ownership to the middle line of the waters which form one of the outlets of the Don River. But, from the evidence, I think that there can be no doubt whatever that Ashbridge's Bay is navigable for small craft; and, therefore, the ownership extended only to the water's edge. This would give the owner of lot 12 riparian rights; and the plaintiff, as the owner of a part of the township lot 12, and which is described as coming down to the water's edge, has the same riparian rights as his predecessor in title had, unless lost by consent given to the conventional line forming the boundary between the property of the plaintiff and that of the defendants.

With great respect, I am unable to agree with the view expressed in the Divisional Court by the Chancellor and Middleton, J., that the portion of the land in question below the water's edge must be treated simply as land without riparian rights. I think it established, by the witnesses of the defence as well as by the witnesses of the plaintiff, that the land south of the line forming the southerly boundary of township lot 12 and the open water is land between high and low water mark. It rises and falls with the rising and falling of the water in the lake and bay. In high water, small boats may pass over it. Fish in great numbers are found there. Clear water is found beneath the floating mass of vegetation; and, notwithstanding the rank growth of aquatic grass, it is quite distinct from what may be called solid land proper. The greater portion of it for the greater part of the year is covered with water. Even when hay is being cut on the land east of the plaintiff's land, it is overflowed with water several inches deep, and the floating mass sinks under the tread, as the growth of grass is being cut.

If I am right as to the water line, then, following the English

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rule of law applied to navigable and non-navigable waters alike, excepting only navigable tide waters, there is the *primâ facie* presumption that the grant from the Crown to the plaintiff's predecessor in title carried his ownership to the middle thread of the bay (the decision in this case by the trial Judge having been given prior to and so not affected by 1 Geo. V. ch. 6(O.): *Keewatin Power Co. v. Town of Kenora* (1908), 16 O.L.R. 184.

It was probably this view of the case that led to the agreement in regard to the conventional boundary line. But I think there exist circumstances and conditions in this case sufficient to repel such presumption. The description of the lot by metes and bounds beginning at a post and giving the acreage—the fact that it fronts on a bay, which is a part of Lake Ontario and connected with it and only separated from it by sands thrown up by the waves—the uniform action of the Crown in claiming ownership of the lands below high water mark by granting to private persons the bed of navigable waters below high water mark—render it quite impossible to apply the English rule of law in favour of the owners of lot 12 fronting on the bay, so as to extend their ownership to the land covered with water. I am, therefore, of opinion that, in the present case, the *primâ facie* presumption is rebutted, and that the grant by the Crown of lot 12 is limited to high water mark. Prior to the *Keewatin* case, the English rule seems not to have been applied in this country to navigable waters, and there are many *dicta* to the contrary. See the cases collected by Anglin, J., in the *Keewatin* case (1906), 13 O.L.R. 237, at pp. 252, 253. It was recently held in the House of Lords, the House being equally divided, and so affirming the decision of the Irish Court, that no right can exist in the public to fish in the waters of a navigable, inland, non-tidal lake, no matter how large: *Johnston v. O'Neill*, [1911] A.C. 552.

The B.N.A. Act and special legislation would seem to govern such a case. This, however, has only an indirect bearing on the present case; as, subject to public regulations, the plaintiff is entitled to fish there either as riparian owner or owner of the water lot.

Prior to the grants, the land between high and low water

mark belonged to the Crown as represented by the Province of Ontario, except such portions as the Dominion might claim under the B.N.A. Act in respect of harbours. See Lord Herschell's judgment in the stated case *Attorney-General for the Dominion of Canada v. Attorneys-General for the Provinces of Ontario Quebec and Nova Scotia*, [1898] A.C. 700, quoted below.

The right of the riparian owner to use the water does not depend upon the ownership of the soil under the water; and whether owned by the Crown, as represented by the Dominion or Province, or by a private person, cannot affect the plaintiff's riparian rights.

Then what were the riparian rights of the grantee of lot 12 and other lots fronting on Ashbridge's Bay? Much emphasis was laid upon the right of navigation in the discussion at bar, but that right of a riparian proprietor is common with the right of the public; and it does not follow that, because the land between high and low water mark in front of the plaintiff's lot is not navigable, therefore he has no riparian rights, or that he would not be affected by the obstruction placed in front of his water lot by the defendants. This depends upon other considerations, to which I will refer presently.

Many questions affecting the present case were submitted in the special case referred by the Governor-General in Council for decision to the Supreme Court, *In re Provincial Fisheries* (1896), 26 S.C.R. 444. The case was carried to the Privy Council: *Attorney-General for the Dominion of Canada v. Attorneys-General for the Provinces of Ontario Quebec and Nova Scotia*, [1898] A.C. 700. Lord Herschell, in giving judgment, pointed out the distinction between proprietary rights and legislative jurisdiction under the B.N.A. Act; that, "whether a lake or river be vested in the Crown as represented by the Dominion or as represented by the Province in which it is situate, it is equally Crown property, and the rights of the public in respect of it, except in so far as they are modified by legislation, are precisely the same. . . . There is no presumption that because legislative jurisdiction was vested in the Dominion Parliament proprietary rights were transferred to it. . . . Whatever pro-

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proprietary rights were at the time of the passing of that Act possessed by the Provinces remain vested in them except such as are by any of its express enactments transferred to the Dominion." It was held that the transfer of "public harbours" operates on whatever is properly comprised in that term, having regard to the circumstances of each case, and is not limited merely to those portions on which public work has been executed. His Lordship expressed the opinion (p. 712) "that it does not follow that, because the foreshore on the margin of a harbour is Crown property, it necessarily forms part of the harbour. It may or may not do so, according to circumstances. If, for example, it had actually been used for harbour purposes, such as anchoring ships or landing goods, it would, no doubt, form part of the harbour; but there are other cases in which, in their Lordships' opinion, it would be equally clear that it did not form part of it." With regard to fisheries and fishing rights, it was held that sec. 91 of the B.N.A. Act did not convey to the Dominion any proprietary rights therein, although the legislative jurisdiction conferred by the section enabled it to affect those rights to an unlimited extent, short of transferring them to others.

It was held in this case by the Supreme Court that the owner, having riparian rights before Confederation, had an exclusive right of fishing in non-navigable, and in navigable non-tidal, lakes, rivers, streams and waters, the beds of which had been granted to them by the Crown, following *The Queen v. Robertson*, 6 S.C.R. 52. Their Lordships of the Privy Council declined to answer this question, as the riparian proprietors were not parties to the litigation, or represented before their Lordships.

It was held in *Pion v. North Shore R.W. Co.* (1887), 14 S. C.R. 677, that a riparian owner on a navigable river is entitled to damages against a railway company, although no land is taken from him, for the obstruction and interrupted access between his property and the navigable waters of the river, for the injury and diminution in value thereby occasioned to his property. This was affirmed in the Privy Council: *North Shore R.W. Co. v. Pion* (1889), 14 App. Cas. 612. Lord Selborne



gave a very full judgment, commenting upon a number of cases. He points out that in *Miner v. Gilmour* (1858), 12 Moore P.C. 131, 157, that tribunal determined, after two arguments, that with respect to riparian rights (in that case the river was not tidal or navigable), there was "no material distinction between the law of Lower Canada and the law of England." He quotes from Lord Kingsdown, who delivered the judgment of the committee in that case, where he said: "By the general law applicable to running streams, every riparian proprietor has a right to what may be called the ordinary use of the water flowing past his land; for instance, to the reasonable use of the water for his domestic purposes, and for his cattle; but, further, he has a right to the use of it for any purposes, or what may be deemed the extraordinary use of it, provided he does not thereby interfere with the rights of other proprietors, either above or below him." He then points out that this general law was decided, in *Lyon v. Fishmongers' Co.* (1876), 1 App. Cas. 662, 683, to be applicable to navigable and tidal rivers. At p. 621 he proceeds: "The only ground of distinction suggested between a non-navigable river (such as that in *Miner v. Gilmour*) and a navigable or tidal river, forming at high water the boundary of riparian land, was that in the case of a non-navigable river the riparian owner is proprietor of the bed of the river *ad medium filum aquæ*, which, in the case of a navigable river such as the St. Charles, belongs to the Crown. The same distinction was contended for in *Lyon v. Fishmongers' Co.*; but the House of Lords, on grounds with which their Lordships concur, thought it immaterial. Lord Cairns rejected the proposition that the right of a riparian owner to the use of the stream depends on the ownership of the soil of the stream; he adopted the words of Lord Wensleydale in *Chasemore v. Richards* (1859), 7 H.L.C. 349: 'The subject of right to streams of water flowing on the surface has been of late year fully discussed, and by a series of carefully considered judgments placed upon a clear and satisfactory footing. It has now been settled that the right to the enjoyment of a natural stream of water on the surface, *ex jure naturæ*, belongs to the proprietor of the adjoining lands, as a natural incident to the right to the soil itself,

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and that he is entitled to the benefit of it, as he is to all the other natural advantages belonging to the land of which he is the owner. He has the right to have it come to him in its natural state, in flow, quantity, and quality, and to go from him without obstruction, upon the same principle that he is entitled to the support of his neighbour's soil for his own in its natural state.' . . . Their Lordships have considered the authorities referred to in support of this part of the appellants' argument, and they are of opinion that none of them tend to establish the non-existence of riparian rights upon navigable or tidal rivers in Lower Canada, or to shew that the obstruction of such rights without Parliamentary authority would not be an actionable wrong, or that, if in a case like the present the riparian owner would be entitled to indemnity under a statute authorising the works on condition of indemnity, the substituted access by openings such as those which the appellants in this case have left would be an answer to the claim for indemnity."

In *Miner v. Gilmour*, 12 Moore P.C. 131, it was held that in respect of riparian rights (in that case the river was not tidal or navigable) there was "no material distinction between the law of Lower Canada and the law of England." Lord Kingsdown, delivering the judgment of the committee, said (p. 156): "By the general law applicable to running streams, every riparian proprietor has a right to what may be called the ordinary use of the water flowing past his land; for instance, to the reasonable use of the water for his domestic purposes, and for his cattle; but, further, he has a right to the use of it for any purposes, or what may be deemed the extraordinary use of it, provided he does not thereby interfere with the rights of other proprietors, either above or below him." And this general law was, in England, held applicable to navigable and tidal rivers (with the qualification only that the public right of navigability must not be obstructed or interfered with), by the House of Lords in *Lyon v. Fishmongers' Co.*, 1 App. Cas. 662.

In the *Lyon* case, the head-note reads: "By the Thames Conservancy Act (20 & 21 Vict. ch. 147), sec. 53, the Conservators appointed under that Act have a power to grant a license to a riparian proprietor to make an embankment in front of his own

land abutting on the river, but though such license might be the owner's justification so far as the public right of navigation was concerned, it would not authorise a licensee, being a riparian owner, to embank in front of his own land so as injuriously to affect the land of another riparian owner." The Lord Chancellor (Lord Cairns) says (p. 672): "With much deference for the Lords Justices, I should have thought that some authority should be produced to shew that the natural rights possessed by a riparian proprietor, as such, on a non-navigable river, are not possessed by a riparian proprietor on a navigable river. The difference in the rights must be between rivers which are navigable and those which are not; and not between tidal and non-tidal rivers; for, as Lord Hale observes, the rivers which are *publici juris*, and common highways for man or goods, may be fresh or salt, and may flow and re-flow or not; and he remarks that the Wey, the Severn, and the Thames, 'and divers others, as well above the bridges as below, as well above the flowings of the sea as below, and as well where they are become to be the private propriety, as in what parts they are of the King's propriety, are public rivers *juris publici*.' A riparian owner on a navigable river has, of course, *superadded to his riparian rights*, the right of navigation over every part of the river, and on the other hand his riparian rights must be controlled in this respect, that whereas, in a non-navigable river, all the riparian owners might combine to divert, pollute, or diminish the stream, in a navigable river the public right of navigation would intervene, and would prevent this being done. But the doctrine would be a serious and alarming one, that a riparian owner on a public river, and even on a tidal public river, had none of the ordinary rights of a riparian owner, as such, to preserve the stream in its natural condition for all the usual purposes of the land; but that he must stand upon his right as one of the public to complain only of a nuisance or an interruption to the navigation. The Lord Justice suggests that the right of a riparian owner in a non-navigable river arises from his being the owner of the land to the centre of the stream, whereas in a navigable river the soil is in the Crown. As to this,

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it may be observed that the soil of a navigable river may, as Lord Hale observes, be private property. But putting this aside, *I cannot admit that the right of a riparian owner to the use of the stream depends on the ownership of the soil of the stream.*”

He then quotes from Lord Wensleydale in *Chasemore v. Richards*, and proceeds: “My Lords, I cannot entertain any doubt that the *riparian owner on a navigable river, in addition to the right connected with navigation to which he is entitled as one of the public, retains his rights, as an ordinary riparian owner, underlying and controlled by, but not extinguished by, the public right of navigation.*”

Lord Chelmsford in the same case (p. 678) says: “Why a riparian proprietor on a tidal river should not possess all the peculiar advantages which the position of his property with relation to the river affords him, provided they occasion no obstruction to the navigation, I am at a loss to comprehend. If there were an unauthorised interference with his enjoyment of the rights upon the river connected with his property, there can, I think, be no doubt that he might maintain an action for the private injury.”

Lord Selborne (p. 683) says: “The title to the soil constituting the bed of a river does not carry with it any exclusive right of property in the running water of the stream, which can only be appropriated by severance, and which may be lawfully so appropriated by every one having a right of access to it. *It is, of course, necessary for the existence of a riparian right that the land should be in contact with the flow of the stream; but lateral contact is as good, jure naturæ, as vertical; and not only the word ‘riparian,’ but the best authorities, such as Miner v. Gilmour, and the passage which one of your Lordships has read from Lord Wensleydale’s judgment in Chasemore v. Richards, state the doctrine in terms which point to lateral contact rather than vertical. It is true that the bank of a tidal river, of which the foreshore is left bare at low water, is not always in contact with the flow of the stream, but it is in such contact for a great part of every day in the ordinary and regular course of nature, which is an amply sufficient foundation for a natural riparian right.*”

In *Stockport Waterworks Co. v. Potter* (1864), 3 H. & C. 300, it was held that "a riparian proprietor derives his rights in respect of the water from possession of land abutting on the stream, and if, by a deed which conveys only land not abutting on the stream, he affects to grant water rights, the grant, though valid as against the grantor, can create no rights for an interruption of which the grantee can sue a third party in his own name."

In *Attorney-General v. Burrige* (1822), 10 Price 350, 24 R.R. 705, it was held that the Crown might grant, by letters patent, all the lands between high and low water-marks: but this subject-matter of grant, as being *jus privatum* in the King, must be subject to the *jus publicum* or public right of the King and people, to the easement of passing and repassing both over the water and the land.

See also *Attorney-General v. Parmeter* (1822), 10 Price 378, 24 R.R. 723, where the right to the seashore was very fully considered, the case afterwards going to the House of Lords.

In *Attrill v. Platt* (1884), 10 S.C.R. 425, it was held that the lateral or riparian contact of the land with the water was sufficient to entitle the riparian owner to object to the flow of the water in its natural state being interfered with.

*Bigaouette v. North Shore R.W. Co.* (1889), 17 S.C.R. 363; A riparian proprietor on a navigable river is entitled to damages against a railway company for any obstruction to his rights of *accès et sortie*, and such obstruction without parliamentary authority is an actionable wrong; following *North Shore R.W. Co. v. Pion*, 14 App. Cas. 612.

Many of the American cases in regard to lands similar to those in the present case are governed by special statutes, and especially in respect of large areas of submerged or partly submerged lands along the great lakes.

Under special Act of 1850, the Federal Government in certain cases conveyed to the State, which was then enabled to make grants of land freed from riparian rights, all which presupposes such rights to exist where not so affected by statute. See *Brown v. Parker* (1901), 127 Mich. 390; *Baldwin v. Erie Shooting Club*, 127 Mich. 659. In the case of *State v. Lake St. Clair Fishing and*

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*Shooting Club* (1901), 127 Mich. 580, the majority of the Court held that "certain land which, in its natural state, was in some places a few inches above, and in others slightly below, the ordinary water level, and was at times entirely submerged, did not constitute a part of the bed of the lake, but was swamp and overflowed land, within the meaning of the Swamp-land Act of 1850, so as to pass to the State thereunder." Hooker, J., in this case, dissenting, held that the lands did not come within the Acts relied upon by the majority of the Court, and that, therefore, they had to be dealt with as at common law; and he reviews the American cases very fully upon the subject. His description of the land in question is very like the present: "After passing the hard land of the island, the banks of the respective channels are submerged to a great extent, if not altogether, and are marked by a rank growth of aquatic plants, which not only border the open water of the channels, but cover a vast area of submerged land, which, time out of mind, has been called the 'St. Clair Flats.' "

The American authorities in regard to riparian and littoral rights are collected in 29 Cyc. 333-337. At p. 336, it is said: "The owner of land bounded by navigable waters has a right to free communication between his premises and the navigable channel of the river. This riparian right of access is strictly the right of access to the front of the property and does not include the right of access to the sides of piers. The right of access does not depend upon the ownership of the lands between low water mark and the line of navigability, and is the same whether the land abuts on tidal or non-tidal water. This right of access is property, and while the right does not prevent the State from assuming jurisdiction and control over the bed and banks between high and low water marks, yet any act which makes the front of his land less accessible to the water is an injury for which an action for damages may be brought, except where the right has been obtained by eminent domain or the interference is the improvement of the navigation of the river by the State or regulation of commerce by Congress. Where the riparian owner is deprived of such right of access, he may also enjoin the obstruction."



Applying the law as indicated in the foregoing cases to the facts here, I am of opinion that the grantee of the broken front of lot 12 had riparian rights quite independently of the right in common with the public of navigation, and that the plaintiff, by virtue of his ownership of the "land lot" which is bounded by the water, and is so recognised in the grant to him of the "water lot," has the same riparian rights. He has the right to use the waters unobstructed; to fish in them; to boat over them; and at all times to reach the open water in front.

I am further of opinion that the obstruction caused by piling earth from the cut on the bank between his land and the cut was an actionable interference with these rights. There was no necessity for their so doing. The cut could have been made without affecting prejudicially the plaintiff's rights by either removing the earth or piling it on the south side, as was done further to the east in front of Leslie's property.

The defendants having made a channel, the plaintiff has the right to reach this channel over the submerged land without obstruction, and to utilise it for navigation; and this none the less because the depth of water has been thereby increased. See *Diamond v. Reddick* (1875), 36 U.C.R. 391; *Beatty v. Davis*, 20 O.R. 373; *Hale, De Jure Maris*.

I do not think the plaintiff is entitled to that part of the relief asking for the reformation of the plan registered, for the reason that, in my opinion, that does not affect his rights. It was not the registration of the plan or the making of the cut by which he was injured; it was the unnecessary raising of the obstruction, shutting him out from the open water.

The defences raised other than that of the denial of the plaintiff's property and riparian rights, I shall now consider. The defendants contend that the plaintiff is bound by the agreement of his predecessor in title, who, as one of the owners of the broken front, accepted a convenient boundary whereby were lost to him any riparian rights, if such ever existed. The recital in this agreement shews that what was in dispute was the boundary representing the high water mark, and it was this boundary they agreed to settle and abide by. Had the Crown been a

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party to this agreement, it would have given the owners the land down to this line, and that line by consent would have represented high water mark, and all lands which came down to that line would have been riparian proprietors'. This agreement was acted upon by the city obtaining a grant of land south of this line. Of course, the Crown was not bound by this agreement; and, to perfect his title, the plaintiff got a grant of what was considered land covered by water stretching between the "land lot" and the conventional boundary line. The plaintiff, therefore, has the right to rest upon this agreement upon which the defendants acted and obtained their grants both from the Ontario and the Dominion Government; and to say that, by consent and by virtue of that agreement, the conventional line as between the plaintiff and defendants must be considered the water's edge or high water mark.

This view as to the intention of the parties and the meaning of the agreement is borne out by reference to what was done by the parties, and is perfectly good evidence, not to vary the terms of the patent, for which it is inadmissible (*Wyatt v. Attorney-General of Quebec*, [1911] A.C. 489), but to shew that the patent was issued in pursuance of the agreement.

To understand the full effect of what was done, it is necessary to go back to the license of occupation granted by the then Province of Canada to the City of Toronto on the 12th January, 1847. Leaving out the formalities of the document, it is a license to the city to occupy "the marsh lying to the eastward of the city and the peninsula which forms the harbour of the city, reserving free access to the beach for vessels, boats, and persons." The city claimed to be entitled to a patent under this license; and, by an order in council of the 1st October, 1866, the issue of the patent for these lands was authorised. In January, 1873, a plan and report were prepared, at the instance of the city, shewing the northern boundary of the marsh to be high water mark, and this is clearly defined on the map and so stated by their engineer. (See his letter to the Mayor of the 18th January, 1873, exhibit 15.)

On the 6th March, 1873, the City Solicitors transmitted the plan and other papers to the Commissioner of Crown Lands, and

asked for a patent for the lands as shewn on the plan. It thus clearly appears that what they claim was the land to high water mark. In a subsequent letter of the 20th April, 1874, reference was made to what had already been done, and the question whether anything further was required was asked. It appears to have been at this stage that the property-owners along the bay raised the question of their rights; and in July an agreement was come to, which was succeeded by the agreement of the 23rd October, above referred to.

In the final petition for the patent, the plan of survey, the description of lands, the first agreement and the agreement of the 23rd October, Unwin's report, and the report of the council, were all included with the petition as the necessary documents upon which the patent was asked.

In Unwin's report, which forms part of the material used in asking for the grant, he says: "The construction to be put upon these terms 'marsh' and 'front' must be a matter of opinion. From the Harbour Master's official records it is clear that what may be termed 'marsh' at a certain season of one year would be covered deep with water at the same season in some other year." He further points out: "That the old surveys of record in the registry office and in your own private keeping shew the high water mark and marsh limit in a position altogether removed from the limits of high water and marsh as seen at the present time."

He then suggested the advisability of adopting for a boundary such straight lines as would, while giving the owners all they were entitled to receive, be satisfactory to the corporation. Here again it is quite plain that what the defendants were striving to obtain was not land in the proper sense of the term, but land between high and low water mark, and, therefore, of certain seasons of the year admittedly covered with water.

Mr. Unwin further refers to the circular inviting the owners to be present, and the difficulty of obtaining a final agreement, which, however, was finally settled upon. There was some difficulty about the final agreement being signed, because of the opening of certain streets which had not been mentioned in the first agreement.

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The grant to the city was finally made in pursuance of the agreement and consent, recognising the boundary line as high water mark. In a letter to the Commissioner of Crown Lands dated the 31st August, 1880, Mr. McWilliams, who had formerly been the City Solicitor, on behalf of the land-owners, points out that, had his clients not believed that the Government admitted their right to all lands lying to the north of those to which the city were entitled, they would never have entered into the agreement for establishing the boundary which led to the issue of the patent to the city.

The Government seems to have recognised the righteousness of the owners' claim by making a grant to the plaintiff of the land between his "land lot" and the boundary line as land covered with water, and at what must be considered a nominal sum; nor did the city take a different view.

In the report of the City Engineer on the reclamation of Ashbridge's Bay, dated the 21st December, 1891, exhibit 7, he says, after referring to the expenditure necessary to cleanse the bay: "This it is that the city, it seems to me, desires to see done; and the main obstacle that stands in the way of doing it is the great expense, coupled with the difficulty and probable further expense of dealing with riparian proprietors on the north shore of the bay whose property will be affected by the works in question. It is this obstacle of expense that has hitherto been a bar to the city's undertaking the work," etc.

As late as 1895, the executive committee submitted their report respecting Ashbridge's Bay improvements, in which they said: "Your committee beg to recommend the adoption of the following report of the City Engineer *re* the above, and that a copy of the plan referred to be filed by the City Surveyor in the registry office for East Toronto; but no work shall be done on the north shore between Blong street and the eastern terminus until satisfactory arrangements have been made with the property-owners as regards riparian rights and filling."

After a perusal of the admitted documents bearing upon this branch of the case, I find it impossible to come to any other conclusion than that the city, down to the commencement of the improvements, recognised that the property-owners had certain



riparian rights, which such improvements might prejudicially affect. The agreement fixing the boundary line, so far from being an answer to the plaintiff's claim, is, in my judgment, the strongest kind of recognition on the part of the defendants of the existence of such claim, and of the settlement upon that basis, and of their recognition of the owners' rights, by receiving a patent from the Crown based upon their consent, and in this action setting up that patent as their title to the land south of the conventional boundary. In my opinion, they are estopped, by their conduct in obtaining the agreement, in acting upon it, and in availing themselves of it, from now denying the existence of those riparian rights which such agreement recognises.

The foregoing affords, in my opinion, distinct ground upon which the plaintiff is entitled to succeed in this action.

It was a reliance of the plaintiff on the action of the council in pursuance of this clear understanding that delayed the plaintiff in bringing his action.

There was no intention and no agreement by the owners to abandon their riparian rights. The conventional boundary having been agreed to, the Government was enabled to grant to the city lands to the south of what was recognised by both parties as the water line. Even had no patent been granted for the part south of the "land lot" to the plaintiff, the defendants would, I think, have been estopped from denying that the plaintiff's title came down to the conventional boundary; but, whether that be so or not, the grant from the Crown of the "water lot" puts the plaintiff's right, in my opinion, beyond question. The plaintiff has now the same rights that he would have had if there had been no grant to the defendants or to himself of the land covered with water, except that the water line by consent is shifted further south. The effect of the conventional line simply settles the boundary of their lands, both of which are lands between high and low water mark and subject to the law affecting such lands.

I have this further to say as to the way the case strikes me. The city, as early as 1847, accepted a license of occupation from the Government of Canada, which, as representing the Crown,

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could only own the land as representing the bed of navigable waters below high water mark. The land having passed at Confederation either to the Dominion as having control of harbours or to the Province as the owner of the bed of navigable waters not theretofore conveyed to a private owner, and having taken a grant from both, the defendants now seek to have it declared that the land was neither one nor the other, but land free from all rights which attach by virtue of that character under which alone they claim the right to have the grants from the Crown made to them. This, in my opinion, they have no right to do, but are bound by the nature and character of the land as represented in their grants, whether from the province or the Dominion. This view is not based only upon the principle of estoppel, but upon the broader ground of public policy, that an individual receiving a grant from the Crown cannot be permitted under that grant to claim something different in character from that asked for and granted.

This point is very well put in *Brown v. Parker*, 127 Mich. 390, and a quotation from *Beard v. Federy* (1865), 3 Wall. 478, 492. The following observations may be referred to: "If parties asserting interests in lands acquired since the acquisition of the country could deny and controvert this record, and compel the patentee, in every suit for his land, to establish the validity of his claim, his right to its confirmation, and the correctness of the action of the tribunals and officers of the United States in the location of the same, the patent would fail to be, as it was intended it should be, an instrument of quiet and security to its possessor. The patentee would find his title recognised in one suit and rejected in another, and, if his title were maintained, he would find his land located in as many different places as the varying prejudices, interests, or notions of justice of witnesses and jurymen might suggest." And again: "We are of the opinion that the survey by the Government, and transfer to and sale by the State to the meander lines, as State swamp land, conclusively establish the boundaries of the lake, and that title of abutting proprietors extend to them upon the presumption that must be conclusive, *i.e.*, that when the meander lines were run they followed the true shore of the

lake." If one puts here the conventional boundary in the present case as representing the authorised surveyed land, and both parties requested the Government so to treat it, by applying for their grants recognising it, the words quoted are directly apposite, I think, to the present case.

The action taken by the Dominion Government in erecting a break-water to protect the harbour cannot affect the plaintiff's rights in this action; the plaintiff is not complaining here of that act, whether right or wrong.

Nor can effect be given, in my opinion, to the defence set up under the patent from the Dominion Government. If the defendants rely upon that grant, they are bound by its terms, and it declares that the lands conveyed form part of the public harbour. If this be so, the plaintiff's lands abut on this harbour, to which he has a right of access as to navigable waters.

It is, however, contended for the defence that an action does not lie, and that the plaintiff, whatever his rights may be, must proceed under sec. 437 of the Municipal Act by arbitration; and that, more than a year having elapsed, any claim that he may have had is barred.

I think there are several answers to this objection. The first answer is, that the improvements made were not made under the Municipal Act, but under special statutes, 54 Vict. ch. 82, sec. 6, and 56 Vict. ch. 85, sec. 9. A further answer is, that the defendants have by their pleadings taken the position that the plaintiff does not own the lands claimed by him, that he has no riparian rights in respect thereof, and that his patent from the Crown is void. These are issues raised by the defence which cannot be tried, I think, by an arbitrator appointed under the Municipal Act. But, on referring to the Act, it will be seen that the injury complained of does not "necessarily result" from the exercise of such powers. Indeed, as before indicated, any injury to the plaintiff would not necessarily follow from the making of the cut. It was the defendants' negligent and wrongful act in depositing the earth taken from the cut to form a northern barrier against the plaintiff. This was wholly unnecessary, and in such case the Act does not apply. Damages under the Act must be the legal and necessary results of the act complained

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of: *The Queen v. Poulter* (1887), 20 Q.B.D. 132. It is only for damages thus necessarily resulting from the exercise of the statutory powers that the land-owner is compelled to seek compensation under the statute: *Corporation of Raleigh v. Williams*, [1893] A.C. 540, at p. 550. See *Brine v. Great Western R.W. Co.* (1862), 31 L.J.Q.B. 101; *Foster v. Rural Municipality of Lansdowne* (1899), 12 Man. L.R. 416.

It may be further noticed that the council may file plans and give notice under sec. 439, and that claims for damages must be filed within sixty days, and in default the claim is barred. Here no notice was served upon the plaintiff; but, on the contrary, the defence takes the position that he has no title. Section 440 declares that the claim shall be barred within one year. Section 443 provides that the claim shall not be barred where the plans do not disclose the damage that may be sustained; and in the present case the plans do not shew that it is the intention to pile the excavated earth as a bank on the north side of the cut, and so do not disclose the damage that the plaintiff may sustain. For these reasons, I think the plaintiff is entitled to bring his action, instead of seeking relief, which could not be adequate, by arbitration.

The judgment appealed from should be set aside; and, the defendants having denied the plaintiff's title and riparian rights, he is entitled to have a declaration confirming the same, and also an injunction restraining the defendants from continuing the obstructions complained of.

Counsel stated, as I understood, at the bar, that the plaintiff was willing to forgo his right to have the obstruction entirely removed if he was permitted access to the open cut along his water front. If the defendants so elect, the order may be so worded in lieu of the injunction.

The plaintiff is entitled to the costs below and of this appeal.

MACLAREN, J.A., agreed with CLUTE, J.

*Appeal dismissed*; MACLAREN, J.A.,  
and CLUTE, J., dissenting.

## [DIVISIONAL COURT.]

## HOWSE V. TOWNSHIP OF SOUTHWOLD.

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*Highway—Obstruction—Act of Stranger—Liability of Municipal Corporation—Injury to Traveller—Nonrepair—Municipal Act, 1903, sec. 606—Action—Time-limit—Stated Case.*

May 20.  
July 11.

A case was stated for the opinion of the Court upon a question of law arising in an action for damages for injuries sustained by the plaintiff by coming in contact with a telephone pole placed upon the highway by a telephone company:—

*Held*, that there is no liability upon a municipality arising from the placing of obstructions upon a highway by a third person, save the liability arising from the failure to repair imposed by sec. 606 of the Municipal Act, 1903; and the plaintiff's right of action, if any, was barred by reason of the action not having been brought within three months.

*Per* RIDDELL, J.:—The stated case did not contain any allegation of an act or omission of the defendants which resulted in or allowed the erection of the offending pole; and so no cause of action appeared.

Judgment of MIDDLETON, J., affirmed.

ACTION brought by Barnum Howse against the Municipal Corporation of the Township of Southwold to recover damages for injuries sustained by the plaintiff by coming in contact with a telephone pole erected upon a highway in the township.

A case was stated by the parties as follows:—

“It appearing from the pleadings that there is a question of law involved in this action, which it would be convenient to have decided before trial of this action, the following case is stated in order that that question may be determined.

“1. This action was not commenced within three months after the damages complained of in the plaintiff's statement of claim, and the defendants, by their statement of defence, contend that the plaintiff's right of action, if any, is barred as against them by sec. 606 of the Municipal Act.

“2. The telephone pole referred to in the plaintiff's statement of claim was erected in the year 1906, by the Southwold and Dunwich Telephone Association Limited, a company incorporated under the Co-operative Companies Act, R.S.O. 1897, ch. 202, for the purpose of constructing and operating a telephone line, the declaration of incorporation under the said Act being dated the 24th day of September, 1906, and filed in the registry office for the county of Elgin on the 20th day of December, 1906.



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“3. No by-law of the defendant township was ever passed permitting or regulating the erection or maintenance of the poles of the said company, but a resolution of the council of the defendant corporation was passed on the 5th day of March, 1906, in the words following: *‘That this Council grant the Southwold and Dunwich Telephone Company the privilege of constructing their telephone lines, as long as they do not cause or have any obstruction in or on the roads and highways of this township.’*

“4. The pole in question is situated on the north side of the highway, as shewn upon the plan made by one Farncomb, C.E., annexed hereto, which plan, for the purpose of this motion, is admitted to correctly shew the *locus in quo*.

“The question for the opinion of the Court is, whether the plaintiff’s right of action, if any, is barred by reason of the action not having been commenced within three months, as required by sec. 606 of the Municipal Act.”

May 17. The case was heard by MIDDLETON, J., in the Weekly Court at Toronto.

*J. D. Shaw*, for the plaintiff.

*Shirley Denison*, K.C., for the defendants.

May 20. MIDDLETON, J.:—A question of law argued, by consent of counsel, before the trial of the action, upon a stated case.

On the 27th June, 1911, the plaintiff, while driving along the north branch of the Talbot road, near the village of Shedden, came in contact with a telephone pole erected upon the highway, and was injured. The telephone pole was erected in the year 1906, by an association incorporated under the Co-operative Companies Act, R.S.O. 1897, ch. 202 (now repealed). This company had no statutory or other right to erect poles upon the highway.

A resolution of the township council was passed on the 5th March, 1906, in the words following: “That this council grant the Southwold and Dunwich Telephone Company the privilege of constructing their telephone lines, as long as they do not cause or have any obstruction in or on the roads and highways of this township.”



This resolution, it is to be observed, does not purport to authorise the erection of any pole upon the highway. Moreover, a resolution is not an authorised method of municipal action. A by-law is necessary.

The Municipal Act, R.S.O. 1897, ch. 223, conferred upon councils of cities, towns, and villages the power of regulating by by-law the erection and maintenance of electric light, telegraph and telephone poles and wires within the municipal limits. See sec. 559, sub-sec. 4. This provision was carried forward unchanged in the revision of 1903; and it was not until 1906 that townships first received any authority to deal with the erection of poles and wires upon highways, when the statute was amended by 6 Edw. VII. ch. 34, sec. 20. This statute came into force on the 14th May, 1906, more than two months after the passing of the resolution in question; so that, in whatever way the resolution is looked at, it appears to be entirely invalid.

This action is unfortunately not brought within the time limited by sec. 606 of the Municipal Act, and so cannot be maintained if the municipality is only liable by reason of its failure to discharge its statutory duty to keep the highway in repair. In other words, the plaintiff, to succeed, must establish misfeasance, and not nonfeasance.

I have not been referred to any case which would justify me in holding that the mere failure to remove an obstruction placed upon the highway by a third person constitutes misfeasance. In Judge Denton's very careful review of the cases (Denton on Municipal Negligence, pp. 28 to 31), it is stated that where the obstruction is placed upon the highway by a stranger, and not by the corporation, the omission of the municipality to remove the obstruction, where there has been a sufficient period of time to justify a finding of negligence against the corporation, constitutes mere nonfeasance, and the action is governed entirely by the provisions of sec. 606. With this I agree.

*Atkinson v. City of Chatham* (1899), 26 A.R. 521, though reversed on another ground in the Supreme Court, places the liability of the municipality substantially upon this ground.

*Pow v. Township of West Oxford*, (1908), 11 O.W.R. 115, 13 O.W.R. 162, is much relied upon by the plaintiff. I do not think

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it turned at all upon the question which is now to be considered, but rather upon the question whether the municipality, in the light of the agreements and legislation therein referred to, remained responsible for that portion of the highway occupied by the railway. The action was brought within the statutory time; and, unless this legislation had relieved the municipality from its duty to repair, nonrepair was abundantly made out. The fact that the condition of nonrepair was caused by the erections of a third party was in itself quite immaterial.

I rest my decision entirely upon the ground that there is no liability on the part of municipalities arising from the placing of obstructions upon the highway by third parties, save the liability arising from the failure to repair imposed by sec. 606.

So holding, I answer the question submitted by finding that the plaintiff's right of action, if any, is barred by reason of the action not having been brought within three months; and it follows that the action must be dismissed, with costs if demanded.

The plaintiff appealed from the judgment of MIDDLETON, J.

June 13. The appeal was heard by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.

*J. D. Shaw*, for the plaintiff. The plaintiff should be allowed to proceed with his action. The resolution of the council of the 5th March, 1906, made the defendants liable. Nor can they escape liability by telling the company that they must not obstruct the highway. Of course, misfeasance must be established: *Atkinson v. City of Chatham*, 26 A.R. 521. I submit that the telephone company were licensees of the municipality: *Denton on Municipal Negligence*, pp. 30, 31, 228; *Cohen v. Mayor, etc., of New York* (1889), 113 N.Y. 532; *Croft v. Town Council of Peterborough* (1855), 5 C.P. 35; *Nevill v. Township of Ross* (1872), 22 C.P. 487; *Lewis v. City of Toronto* (1876), 39 U.C.R. 343; *Howarth v. McGugan* (1893), 23 O.R. 396; *Rowe v. Corporation of Leeds and Grenville* (1863), 13 C.P. 515; *Keech v. Town of Smith's Falls* (1907), 15 O.L.R. 300; *Pow v. Township of West Oxford*, 11 O.W.R. 115, 13 O.W.R. 162; *Biggar v. Township of Crowland* (1906), 13 O.L.R. 164.

[RIDDELL, J., referred to *Borough of Bathurst v. Macpherson* (1879), 4 App. Cas. 256, cited in *Brown v. City of Toronto* (1910), 21 O.L.R. 230.]

*Shirley Denison*, K.C., for the defendants. The township council had no power to allow the company to build on the highway; and in any event the council did not do so. The council could not proceed upon a resolution: a by-law would be necessary; the one is governmental, the other legislative: *Foster v. Reno* (1910), 22 O.L.R. 413, at p. 416; *In re Morell v. City of Toronto* (1872), 22 C.P. 323, cited in Biggar's Municipal Manual, p. 354. The company were not licensees. The pole was not placed by an agent of the defendants. The plaintiff's right of action, if any, is barred by reason of the action not having been brought within three months. On the question of nonfeasance and misfeasance, I refer to *McClelland v. Manchester Corporation*, [1912] 1 K.B. 118.

*Shaw*, in reply.

July 11. FALCONBRIDGE, C.J.:—I agree with the learned Judge that the only possible liability would be under sec. 606, arising from failure to repair. And this is nonfeasance, and not misfeasance; and the plaintiff's right of action is barred by lapse of time.

Appeal dismissed; with costs if exacted.

BRITTON, J.:—The liability of the township, if any, arose by reason of the highway being in a dangerous condition—a condition created by the erection of the telephone pole. The township did not place the pole there—but the members of the council knew it was there. Even if express notice or knowledge could not be established, the pole was there for so long a time that notice and knowledge would be implied. That liability is for nonrepair—not a liability for the act itself of placing the pole on the highway. The liability being for nonfeasance, the limitation of three months as the time within which an action must be brought bars any recovery by the plaintiff. For these reasons and for reasons given by the learned Judge from whose

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decision this appeal is taken, the appeal must be dismissed, and with costs if demanded.

RIDDELL, J.:—I would dismiss the appeal with costs, on the short ground that the case stated does not contain any allegation of an act or omission of the defendants which resulted in or allowed the erection of the offending pole.

It will be seen that there is no permission to erect any pole on the highway—all that may be meant may be permission to string the wires across the highway, out of all danger.

If there is any fact which has not been brought to the attention of the Court, that is no fault of ours: we have no right to go beyond the case as stated.

*Appeal dismissed.*

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[FALCONBRIDGE, C.J. K.B.]

# VOLCANIC OIL AND GAS CO. v. CHAPLIN.

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July 12.

*Water and Watercourses—Crown Grant of Land Bounded by Highway—Running near Bank of Lake—Encroachment of Water upon Highway and Land beyond—Right of Grantee to Land Covered by Water—Fixed Termini—Lease by Crown of Land Previously Granted—Trespass—Action—Parties—Attorney-General—Injunction—Damages.*

The original Talbot road, which formed the south-westerly boundary of the lands included in a grant from the Crown in 1825 of lot 178, Talbot road survey, to the predecessor of the plaintiff C., ran near the bank of Lake Erie. Along the shore of the lake, in that locality, the waters of the lake encroached upon the land, undermined the bank, caused it to subside, and then gradually washed it away. By reason of this encroachment of the lake, Talbot road at an early period grew dangerous and unsafe for public travel, until, about 1838, it was abandoned as a means of public travel, and a new road, for many years known as the Talbot road, was opened up and dedicated to public travel. This road continued to be the travelled road known as Talbot road, but the original Talbot road across the lake front had long since been washed away by the waters of the lake, and now those waters had advanced beyond where they were at the time of the original Talbot road survey; the waters had washed away the reserve left in front of the Talbot road, also the Talbot road itself and some rods of the front of the surveyed lots; so that so much of the land patented to C.'s predecessor, and now owned by him, as was above the waters of the lake, bordered on the waters, and not on the original Talbot road. In 1911 the Crown made a lease to the defendant C. of the lands covered by the waters of Lake Erie in front of the plaintiff C.'s lot:—

*Held*, upon the evidence, that the lands demised by the Crown were part of lot 178 north of the old Talbot road; and that, as the plaintiffs could gain no land by accretion, alluvion, or other cause, they should not lose by encroachment of the water upon their land, to which fixed termini were assigned by the grant from the Crown.

Review of the authorities.



There is no case in which it has been expressly held that a person in the position of the plaintiff C. loses his property because of the gradual encroachment of the water past the land in front of the road, past the road, and past the fixed boundary of the plaintiffs' land.

*Held*, also, that the statute 1 Geo. V. ch. 6 had no application; and that the Attorney-General was not a necessary party to the action.

*Held*, also, that the defendants had trespassed upon the plaintiffs' land, and that the plaintiffs were entitled to an injunction and damages.

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ACTION by the Volcanic Oil and Gas Company, John G. Carr, and the Union Natural Gas Company of Canada Limited (added by order in Chambers), plaintiffs, against Chaplin and Curry, defendants, for a declaration of the plaintiffs' right of ownership of certain lands, and for an injunction and damages in respect of trespasses alleged to have been committed by the defendants thereon.

April 9 and 10. The trial of the action was begun and the evidence taken before FALCONBRIDGE, C.J.K.B., without a jury, at Chatham.

May 10. The argument was heard at Toronto.

*G. F. Shepley*, K.C., and *J. G. Kerr*, for the plaintiffs.

*O. L. Lewis*, K.C., for the defendant Curry.

*W. Stanworth*, for the defendant Chaplin.

July 12. FALCONBRIDGE, C.J.:—The plaintiffs the Volcanic Oil and Gas Company carry on business in the counties of Essex and Kent in the production and sale of petroleum and natural gas; the plaintiff Carr is a farmer; the defendant Chaplin is described as a wheel manufacturer; the defendant Curry is an oil and gas drilling operator.

The plaintiff Carr is the owner and occupant of the westerly half of lot 178, Talbot road survey, in the township of Romney. It was granted by the Crown by patent dated the 29th January, 1825, to Carr's predecessor. The lands are described in the patent in manner following, that is to say: "All that parcel or tract of land situate in the township of Romney, in the county of Kent, in the western district in our said Province, containing by admeasurement one hundred acres, be the same more or less, being the south-easterly part of lot number 178 on the north-westerly side of Talbot road west, in the said township, together with all the woods and waters thereon lying and being, under the reservations, limitations, and conditions hereinafter expressed,



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which said one hundred acres are butted and bounded or may be otherwise known as follows, that is to say: commencing at the north-westerly side of the said road in the limit between lots numbers 177 and 178 at the easterly angle of the said lot 178; thence on a course about sixty degrees west along the north-westerly side of the said road twenty chains seventy-one links more or less to the limit between lots numbers 178 and 179; thence north forty-five degrees west sixty chains more or less to the allowance for road between the townships of Romney and Tilbury East; thence east twenty-nine chains more or less to the limit between lots numbers 178 and 177; thence south forty-five degrees east 47 chains more or less to the place of beginning."

The plaintiffs claim that the original Talbot road, which formed the south-westerly boundary of the lands included in the above patent, ran near the bank of Lake Erie, which at this point is many feet above the beach, and rises perpendicularly therefrom, having a clay front facing the waters of the lake. The plaintiffs further allege that along the shore of Lake Erie, in that locality, the waters of the lake have been encroaching upon the lands, undermining the bank, causing it to subside, and then gradually washing it away; that, by reason of this encroachment of the lake, Talbot road at an early period grew dangerous and unsafe for public travel, until, about the year 1838, it was abandoned as a means of public travel, and a new road, which has for many years been known as the Talbot road, was opened up and dedicated to public travel; that this road still continues to be the travelled road known as Talbot road, but the original Talbot road across the lake front has long since been washed away by the waters of the lake, and now those waters have advanced beyond where they were at the time of the original Talbot road survey; so that they have washed away the reserve left in front of the Talbot road, also the Talbot road itself and some rods of the front of the surveyed lots; so that now so much of the lands patented to Carr's predecessor, and now owned by him, as are now above the waters of Lake Erie, border on the waters of the lake, and not on the original Talbot road.

The above statements are denied by the defendants, but I find them to have been proved, as I shall hereinafter state.

On or about the 4th July, 1908, the plaintiff Carr executed

and delivered to the plaintiffs the Volcanic company a grant and demise of the exclusive right to search for, produce, and dispose of petroleum and natural gas in, under, and upon the said lands, together with all rights and privileges necessary therefor, etc.

By instrument under the Great Seal of the Province of Ontario, dated the 1st August, 1911, known as Crown lease number 1836, the Government of the Province demised and leased unto the defendant Chaplin, his heirs, executors, etc., the whole of that parcel or tract of land under the waters of Lake Erie in front of this lot, amongst others (the particular description of which is set out in paragraph 5 of the statement of defence of Curry).

About the month of September, 1911, the defendant Chaplin made a verbal contract with the defendant Curry for putting down a well for the production of petroleum and natural gas in and upon the lands so demised by the Crown to Chaplin; and Curry, acting under such contract, entered upon what the plaintiff Carr claims to be his land, with men and teams, and constructed a derrick and engine-house, etc.

The plaintiffs, claiming that this entry was wholly unlawful, made objection thereto; and, on the defendants persisting in their operations, the plaintiffs obtained an injunction from the local Judge, which injunction was continued until the trial. The plaintiffs now ask: (1) that the injunction be made perpetual; (2) a declaration of their rights as to the ownership of the land, and as to riparian rights; and (3) damages.

The defendants claim that, if the waters of the lake have washed away the bank and encroached in and upon lot 178, the lands up to the foot of the high bank before-mentioned became the property of the Crown, and that the south-westerly external boundaries of the lot shifted as the waters of the lake encroached thereon, giving full right to the Crown to enter into the Crown lease before-mentioned.

The point involved is extremely interesting, and is one which, if I correctly apprehend the English and Canadian cases, has never yet been expressly decided, either in the old country or here.

The surveyors who were called all agree that, by reason of the original survey having been made so long ago, and of the disappearance of original monuments, etc., they could not now lay out upon the land and water, as they now exist, the old Talbot road.

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Numerous witnesses were called who remembered that road and could speak of its boundaries, and of the erosion of the beach causing the road to be carried away north to its present position—many rods north of its original *situs*. The evidence is overwhelming (I disregard the curious evidence of Samuel Cooper), and I find it to be the fact that the *locus* now in controversy is part of the lot 178 north of the old Talbot road.

Having come to this conclusion, it follows that, if the plaintiffs' contention in law is well founded, it is quite immaterial whether or not the construction of the derrick is entirely in the water, or partly in the water and partly on the beach—the fact being that it is on Carr's property.

In Gould on Waters, 3rd ed., para. 155, pp. 306 to 310, inclusive, after stating the general rule that "land formed by alluvion, or the gradual and imperceptible accretion from the water, and land gained by reliction, or the gradual and imperceptible recession of the water, belong to the owner of the contiguous land to which the addition is made," and that "conversely land gradually encroached upon by navigable waters ceases to belong to the former owner," quoting the maxim *Qui sentit onus debet sentire commodum*, the author proceeds (p. 309): "But when the line along the shore is clearly and rigidly fixed by a deed or survey, it will not, it seems, afterwards be changed because of accretions, although, as a general rule, the right to alluvion passes as a riparian right."

In *Saulet v. Shepherd* (1866), 4 Wall. (U.S.) 502, it was held that the right to alluvion depends upon the fact of contiguity of the estate to the river—where the accretion is made before a strip of land bordering on a river, the accretion belongs to *it* and not to the larger parcel behind it and from which the strip when sold was separated; citing at length the judgment in a case of *Gravier v. City of New Orleans*, which is in some little known report not to be found in our library at Osgoode Hall.

In *Chapman v. Hoskins* (1851), 2 Md. Ch. 485, the general rule is stated as follows (paragraph 2, head-note): "Owners of lands bordering upon navigable waters are, as riparian proprietors, entitled to any increase of the soil which may result from the gradual recession of the waters from the shore, or from accretion by alluvion, or from any other cause; and this is regarded as the

equivalent for the loss they may sustain from the breaking in, or encroachment of the waters upon their lands.’

Now, in the case in hand, the plaintiffs say that they could gain nothing by accretion, by alluvion, or other cause; and, consequently, they should not lose by encroachment of the water upon their land, to which fixed *termini* were assigned by the grant from the Crown. This doctrine seems to be well supported by decisions of Courts which are not binding upon me, but which command my respect, and which would seem to be accurately founded upon basic principles.

In *Smith v. St. Louis Public Schools* (1860), 30 Mo. 290, the principle is very clearly stated: “The principle upon which the right to alluvion is placed by the civil law—which is essentially the same in this respect as the Spanish and French law, and also the English common law—is, that he who bears the burdens of an acquisition is entitled to its incidental advantages; consequently, that the proprietor of a field bounded by a river, being exposed to the danger of loss from its floods, is entitled to the increment which from the same cause may be annexed to it. This rule is inapplicable to what are termed limited fields, *agri limitati*; that is, such as have a definite fixed boundary other than the river, such as the streets of a town or city.” The reference in the judgment to the English common law is not quite so positive as the head-note states it. The Judge (Napton) in the course of a very learned opinion says (p. 300): “It will be found, indeed, that upon this subject the Roman law, and the French and Spanish law which sprung from it, are essentially alike, if we except mere provincial modifications; and it is believed that the English common law does not materially vary from them. This uniformity necessarily results from the fact that the foundation of the doctrine is laid in natural equity.” In saying this he may have had in his mind the language of Blackstone, to be now found in book 2, Lewis’s ed., pp. 261-2; although he does not cite him. There are some earlier English authorities to which I shall refer later.

Then there is a case of *Bristol v. County of Carroll* (1880), 95 Ill. 84 (para. 3 of head-note): “3. To entitle a party to claim the right to an alluvial formation, or land gained from a lake by alluvium, the lake must form a boundary of his land. If any

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land lies between his boundary line and the lake, he cannot claim such formation."

In *Doe dem. Commissioners of Beaufort v. Duncan* (1853), 1 Jones (N.C.) 234, at p. 238, Battle, J., says: "Were the allegations supported by the proof, an interesting question would arise, whether the doctrine of alluvion applies to any case where a water boundary is not called for, though the course and distance, called for, may have been co-terminous with it? We do not feel at liberty to decide the question, because we are clearly of opinion that the evidence given on the part of the defendant does not raise it."

*Cook v. McClure* (1874), 58 N.Y. 437, is a judgment of the Court of Appeals of the State of New York. The head-note is as follows: "*It seems*, the rule that, where a boundary line is a stream of water, imperceptible accretions to the soil, resulting from natural causes, belong to the riparian owner, applies as well where the boundary is upon an artificial pond as upon a running stream. In an action of ejectment, plaintiff claimed under a deed conveying premises upon which was a mill and pond. The boundary line along the pond commenced at 'a stake near the high-water mark of the pond,' running thence 'along the high-water mark of said pond, to the upper end of said pond.'" Held, that the line thus given was a fixed and permanent one, and did not follow the changes in the high-water mark of the pond; and that defendant, who owned the bank bounded by said line, could not claim any accretions or land left dry in consequence of the water of the pond receding, although the gradual and imperceptible result of natural causes."

In *The Schools v. Risley*, 10 Wall. (U.S.) 91, the decision was as follows: "A street or tow-path or passway or other open space permanently established for public use between the river and the most eastern row of blocks in the former town of St. Louis, when it was first laid out, or established, or founded, would prevent the owners of such lots or blocks from being riparian proprietors of the land between such lots or blocks and the river. But this would not be true of a passage-way or tow-path kept up at the risk and charge of the proprietors of the lots, and following the changes of the river as it receded or encroached, and if the inclosure of the



proprietor was advanced or set in with such recession or encroachment."

In *In re Hull and Selby Railway* (1839), 5 M. & W. 327, the general law as to gradual accretion or recession is stated. Alderson, B., says (p. 333): "The principle laid down by Lord Hale, that the party who suffers the loss shall be entitled also to the benefit, governs and decides the question. That which cannot be perceived in its progress is taken to be as if it never had existed at all."

See also *Giraud's Lessee v. Hughes* (1829), 1 Gill & Johnson (14 C.A. Md.) 115.

The defendants' counsel, in the course of a very elaborate and careful argument, cited numerous authorities in support of the view that the plaintiff Carr had lost the land by the encroachment of the water. I do not cite all of these, because they are set out at large in the extended report of the argument\*; but I do not think that there is any case in which it has been expressly held that a person in the position of this individual plaintiff loses his property because of the gradual encroachment of the water past the land in front of the road, past the road, and past the fixed boundary of the plaintiffs' land. He could not have gained an inch of land by accretion even if the lake had receded for a mile; and, therefore, it seems that the fundamental doctrine of mutuality, formulated in the civil law and adopted into the jurisprudence of many countries, cannot apply to him.

Perhaps the strongest English case cited by the defendants' counsel was *Foster v. Wright* (1878), 4 C.P.D. 438: "The plaintiff was lord of a manor held under grants giving him the right of fishery in all the waters of the manor, and, consequently, in a river running through it. Some manor land on one side of, and near but not adjoining the river, was enfranchised and became

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\* The authorities cited by counsel for the defendants were the following: Farnham on Waters, pp. 280, 281, 291, 296, 309; *Foster v. Wright*, 4 C.P.D. 438; Gould on Waters, 3rd ed., p. 308; *Standly v. Perry* (1879), 3 S.C.R. 356; Encyc. Laws of England, 2nd ed., vol. 2, pp. 143, 145; vol. 14, pp. 625, 630, 631; *Hindson v. Ashby*, [1896] 1 Ch. 78, [1896] 2 Ch. 1; *Point Abino Land Co. v. Michener* (1910), 2 O.W.N. 122; *Parker v. Elliott* (1852), 1 C.P. 470, 491; Michael and Wills on Gas and Water, 6th ed., pp. 409, 410, 411; Hall's Rights of the Crown in Sea-shore (1881), p. 683; *Attorney-General v. Terry* (1874), L.R. 9 Ch. 423; Halsbury's Laws of England, vol. 7, p. 116; *Regina v. Port Perry and Port Whitby R.W. Co.* (1876), 38 U.C.R. 431; *Re Sinclair* (1908), 12 O.W.R. 138; *Lyon v. Fishmongers' Co.* (1875), 1 App. Cas. 662, 671, 672, 679, 680.

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the property of the defendant. The river, which then ran wholly within lands belonging to the plaintiff, afterwards wore away its bank, and by gradual progress, not visible, but periodically ascertained during twelve years, approached and eventually encroached upon the defendant's land, until a strip of it became part of the river bed. The extent of the encroachment could be defined. The defendant went upon the strip and fished there:" *Held*, that an action of trespass against him for so doing could be maintained by the plaintiff, who had an exclusive right of fishery which extended over the whole bed of the river notwithstanding the gradual deviation of the stream on to the defendant's land."

That case goes a long way in support of the defendants' contention. But Lord Coleridge, C.J., concurs only in the result arrived at by Lindley, J. He thinks the safer ground appears to be "that the language (of the grant) conveys . . . a right to take fish, and to take it irrespective of the ownership of the soil over which the water flows and the fish swim. The words appear to me to be apt to create a several fishery, *i.e.*, as I understand the phrase, a right to take fish in *alieno solo*, and to exclude the owner of the soil from the right of taking fish himself; and such a fishery I think would follow the slow and gradual changes of a river, such as the changes of the Lune in this case are proved or admitted to have been."

There is a reference in the argument, and in the judgment in this case, to some of the old authorities: for example, "Britton, book 2, ch. 2, sec. 7, Nichol's translation, p. 218: "But if the increase has been so gradual, that no one could discover or see it, and has been added by length of time, as in a course of many years, and not in one day or in one year, and the channel and course of the water is itself moving towards the loser, in that case such addition remains the purchase and the fee and freehold of the purchaser, *if certain bounds are not found.*"

Lindley, J., seems to think that in *In re Hull and Selby Railway*, to which I have already referred, the Court declined to recognise this principle.

As against the authorities in the United States which I have cited, there is a very strong case of *Widdecombe v. Chiles* (1903), 73 S.W.Repr. 444, a judgment of the Supreme Court of Missouri. The head-note is as follows: "Defendant was the owner of the

south half of a section of land between which and the river bed there was originally a strip of 8 acres, forming the fractional north half, which had not been patented. The river changed its bed until it had washed away the 8-acre strip, and flowed through defendant's land, when it began to rebuild to defendant's land all that it had washed away, and about 200 acres additional. Plaintiff then received a patent for the fractional north half of the section as described by the original survey. *Held*, that, the accretion being to defendant's land, plaintiff took no title by his patent." And Valliant, J., says (p. 446): "This Court has not said in either of those cases, and we doubt if any Court has ever said, that land acquired under a deed giving metes and bounds which do not reach the river—which in fact did not reach the river when the deed was made—does not become riparian when the intervening land is washed away, and the river in fact becomes a boundary."

In considering authorities which are not binding upon me, and when I have to decide "upon reason untrammelled by authority" (*per* Werner, J., in *Linehan v. Nelson* (1910), 197 N.Y. 482, at p. 485), I prefer those United States decisions, which I have earlier cited. There have also been cited to me authorities which it is contended dispose completely of the *Widdecombe* case, viz., the *Lopez* case, which is reported as *Lopez v. Muddun Mohun Thakoor* (1870), 13 Moo. Ind. App. 467; *Hursuhai Singh v. Synd Lootf Ali Khan* (1874), L.R. 2 Ind. App. 28; and Theobald's Law of Land, p. 37.

It was strongly contended by the junior counsel for the plaintiffs that, apart from the main question, and granting that the erosive action of the lake has encroached upon the plaintiff Carr, and that he has lost some of his land, then at any rate he only loses it down to the low water mark. But, having regard to the view that I take about the main question, it is not necessary to consider that argument.

I do not see that the statute 1 Geo. V. ch. 6 has any application to this case; nor do I see that the Attorney-General ought to bring the action or is a necessary party—the plaintiffs being concerned only with the trespass upon their lands, and not with any supposed public right.

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The good faith, or the opposite of the defendants, in making the trespass, is a matter of no consequence in the disposal of the action.

I find, therefore, that there has been a trespass by the defendants upon the plaintiffs' land, and that they are entitled to have the injunction herein made perpetual, with full costs on the High Court scale and \$10 damages.

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*Animals — Dog Killed when Trespassing — Justification — Apprehended Danger to Sheep—R.S.O. 1897, ch. 271, sec. 9(c)—Municipal By-law Authorising Destruction of Dog—Municipal Act, 1903, sec. 540—Powers of Legislature—Compensation—Found Running at Large—Findings of Trial Judge—Appeal—Damages.*

The plaintiff's collie dog was killed by the defendants on their farm, whereon sheep were kept. A by-law passed by the council of the township in which the farm was situated provided: "It shall not be lawful for any dog to run at large unaccompanied by its owner or by some member of such owner's family; and any dog . . . found so running at large at a greater distance than one-half mile from the premises of its owner, and unaccompanied therewith, may be killed by any resident ratepayer of this municipality:"—

*Held*, that the council had power, under the Consolidated Municipal Act, 1903, sec. 540, sub-secs. 1 and 2, to pass this by-law, which was to be regarded as a by-law restraining and regulating the running at large of dogs, and for killing dogs running at large contrary to the by-law.

But *held*, upon the evidence, that the killing of the dog was not justified under the by-law; RIDDELL, J., dissenting.

Judgment of the County Court of the County of Prince Edward affirmed.

*Per* BRITTON, J.:—The dog was not at first "found" on the defendants' premises. Before it came upon the defendants' premises, it was "found," in the sense of being seen by the defendants, upon the highway within half a mile of the plaintiff's premises.

*Per* RIDDELL, J.:—The statute R.S.O. 1897, ch. 271, sec. 9(c), afforded a perfect defence to the action: the evidence established that it was after sunset that the dog was killed—the dog was found straying, and it was on a farm whereon sheep were kept.

But, in any case, the by-law was sufficient to protect the defendants.

The Legislature has power to make laws providing for the forfeiture or destruction of property without compensation to the owner: *Florence Mining Co. v. Cobalt Lake Mining Co.* (1908), 18 O.L.R. 275, 279.

The Legislature, by sub-clause (a) of sub-sec. 2 of sec. 540 of the Consolidated Municipal Act, 1903, simply intended to remove from the realm of controversy the question whether a dog was running at large in the one case, and to lay down as a matter of law that, when a dog was "found in a street or other public place . . . not under the control of any person," it was running at large. But no other case was provided for; and in any other case the question of running at large *aut non* remains a question of fact.

The dog was "found" where and when it was killed—on the defendants' premises—although previously seen by the defendants on the highway.

*Per* Curiam:—The trial Judge's assessment of the plaintiff's damages at \$125 could not, upon the evidence, be interfered with.



APPEAL by the defendants from the judgment of the County Court of the County of Prince Edward, in favour of the plaintiff, in an action for damages for the loss of a dog killed by the defendants.

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Reasons for judgment of the County Court Judge, in which the facts are stated, are as follow:—

This is an action brought by the plaintiff against the defendants to recover damages for the killing of a dog of the plaintiff by the defendants on the 1st day of July, 1911. The case was tried by me without a jury on the 3rd April, 1912, when, after hearing argument of counsel, I reserved judgment.

The dog was shot upon the premises of the defendants. The act was done by the defendant Ross Collins, a young man of apparently about twenty-one years of age, still at home with his father, who is the other defendant. The father does not dispute his responsibility for the son's act.

The plaintiff and defendants are farmers, living in the township of Hillier. Their farms abut on what is called the Lake Shore road, which runs east and west; the plaintiff to the west and the defendants to the east. The farm of the plaintiff lies wholly to the north of the road, that of the defendants extends across the road, and the dwelling-house on the latter is on the portion of the farm south of the road. Two other farms, containing three hundred acres, intervene.

Except as to the exact spot where the dog was killed, there can be no question about the material facts of the case.

As to the law, in Halsbury's Laws of England, vol. 1, sec. 857, p. 395, the common law applicable is thus stated: "To kill, shoot, or injure another man's dog without legal justification is an actionable wrong at common law. It is no legal justification that the dog was trespassing. In order legally to justify such an act it must be proved that it was done under necessity for the purpose of protecting the person, or saving property in peril at the moment of the act."

It is not pretended that under common law there was any justification in this case for the killing of the dog.

Such common law rule, however, has been changed by our statute, R.S.O.1897, ch. 271, "An Act for the Protection of Sheep and to impose a Tax on Dogs;" sec. 9 authorises the killing of



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any dog *seen* (epitomising the three cases): (1) worrying sheep; (2) in an enclosed field, giving tongue and terrifying sheep therein; and (3) straying between sundown and sunrise on any farm where sheep are kept.

The defendants, by their statement of defence, justified the killing of the dog under this statute, pleading, under sec. 10, "not guilty by statute," and also adding a special plea. This latter, however, alleges no legal justification, and would, I think, have been struck out on application in Chambers.

The defendants' counsel explicitly conceded at the trial that, upon the evidence given thereat, no justification had been established under the statute. But on his application, at the opening of the trial, I had granted him leave to amend his statement of defence by justifying the killing under a by-law of the council of the township, No. 14 of their revised by-laws, 1911. As I then remarked, I still think, he was entitled to avail himself of such by-law, even without amendment. In *Doan v. Michigan Central R.W. Co.* (1890), 17 A.R. 481, it was held that the defendants therein, under their plea of "not guilty by statute," were entitled to prove contributory negligence on the part of the plaintiff without any special plea of contributory negligence.

The only question, then, is whether the killing of the dog was justified under sec. 2 of the above by-law, which is: "It shall not be lawful for any dog to run at large unaccompanied by its owner or by some member of such owner's family; and any dog, except hounds, while actually engaged in hunting, found so running at large at a greater distance than one-half mile from the premises of its owner, and unaccompanied therewith (*sic*), may be killed by any resident ratepayer of this municipality."

The authority for passing such by-law, or rather sec. 2 thereof, is the Consolidated Municipal Act, 1903, sec. 540, sub-secs. 1 and 2. Such authority is to pass by-laws: "1. For restraining and regulating the running at large of dogs . . . 2. For killing dogs *running at large* contrary to the by-laws;" "or those impounded under the provisions thereof" (1 Geo. V. ch. 57, sec. 8 (2))—"(*a*) For the purposes of the two next preceding paragraphs a dog shall be deemed to be running at large *when found in a street or other public place* and not under the control of any person."

A by-law passed under this authority can only justify the killing of dogs found running at large in a *street or other public place*.

This by-law No. 14 assumes to justify the killing of a dog found running at large *anywhere*, at a greater distance than one-half mile from the premises of its owner, etc. The township council had no authority so to enact.

I do not think it could be successfully argued that there should be read into this by-law the same interpretation of the words "running at large," used therein, as the statute gives to them. But, if that view could be taken, then it would follow that this dog was not in fact, when it was killed, running at large contrary to the by-law. During all the time that it was within sight of the defendants, it was upon their own private property. When first seen, it was admittedly several hundred feet away to the west of the house. When shot, it was near the house. The defendants say they buried it in a hole near where it was shot. To prove that where it was shot was over a half mile from the plaintiff's premises, two witnesses were adduced who had measured the distance from this hole to the plaintiff's premises. They made the distance just eleven and a half feet over a half-mile. Now, assuming that the hole where the dog was buried was the place where it was shot, and that the measurement given is correct, I am not at all sure that this proves that the dog was "*found*" running at large more than a half-mile from the plaintiff's premises. Was not the dog "*found*," that is to say, "*discovered*," "*met with by accident*," "*chanced upon*," "*fell in with*," when first seen? If so, the dog, when "*found*," was not running at large, &c., *at a greater distance than one half-mile from the premises of its owner*; it would then be several hundred feet within such half-mile. So that, if I am right in this view, even under the by-law as it reads and independent of the statute, all that the defendants had a right to do was to drive the dog away, and not, as they did, proceed to kill it.

In no view, do I think, can the killing of the dog be justified. The defendants say that at the time there was sheep on the farm. But these, they admit, were to the east of the house, not within sight of the dog; and the dog's presence on the farm was not in any way disturbing them. It is not charged that this dog ever injured, or shewed any disposition to injure, sheep.

There cannot be any doubt, I think, but that it was the de-

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defendants' own female dog which was the attraction. The younger defendant stated that he had seen the plaintiff's dog there before, a dozen times. There was evidence, too, that other dogs were so attracted.

As to the amount of damages which should be allowed the plaintiff. The dog was referred to as "a collie dog," not a thoroughbred, but evidently a remarkably intelligent animal, well trained and exceedingly useful to the plaintiff about his farm. He and his wife naturally prized it very highly. I would not, I think, be justified in allowing anything like the amount that is asked. But the amount ought certainly to be something pretty substantial. After the most careful consideration I can give the matter, I have concluded that \$125 would be a proper sum.

There will, therefore, be judgment for the plaintiff against the defendants for that amount, with costs, including the costs of the examination for discovery before trial.

June 12. The appeal was heard by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.

*J. H. Moss*, K.C., for the defendants. The result of the action depends on the validity of a local by-law, which, the learned trial Judge said, went beyond the power of the enabling section of the statute, sec. 540, sub-secs. 1 and 2, of the Municipal Act, 1903. The trial Judge said that a by-law passed under the authority of the Municipal Act can justify the killing of such dogs only as are found running at large in a street or other public place. I submit that the learned Judge misapprehended the meaning of the sub-sections. I contend that "running at large" means, "not under control." The killing in this case, I submit, was justified. In any event, the damages are excessive.

*McGregor Young*, K.C., for the plaintiff. I adopt the reasons of the learned trial Judge. No doubt, the defendants must excuse themselves for the destruction of another's property. The amendment of 1903 was made in order to define what "running at large" means. The statute refers to a street or other public place, and the by-law cannot enlarge the meaning. Dogs are not at large anywhere except on a street or other public place. There must be a by-law to justify the killing. As there was no

such valid by-law, the killing was not justified. The damages are not excessive. At any rate the evidence is not too clear that the dog was found without the distance. The defendants should have strictly identified the place.

*Moss*, in reply, referred to *Craies on Statute Law*, 2nd ed., p. 211, and 2 Cyc. 443.

July 31. *BRITTON, J.*—The action is for damages for wilfully and unlawfully killing the plaintiff's dog. There is no dispute about the ownership of the dog; the dog was wilfully killed by the younger defendant; and the other defendant, the father, frankly admits liability, if any, for the act of his son. The learned County Court Judge, who tried the action without a jury, found for the plaintiff, and assessed the damages at \$125. The appeal is not only upon the question of liability, but also for a new trial, or reduction of damages.

The dog was a valuable one, even if not thoroughbred. He was well trained to herd and attend to cattle, was a kind and affectionate animal, a good watch-dog, to which the plaintiff and his wife were much attached. A good deal of evidence was given as to the value of the dog, or the value of such a dog; and, as a result, it is quite clear that, if there is liability, the damages cannot be considered excessive.

In his reasons for judgment, the trial Judge states: "The defendants' counsel explicitly conceded at the trial that, upon the evidence given thereat, no justification had been established under the statute," &c. And further: "The only question, then, is whether the killing of the dog was justified under sec. 2 of the . . . by-law." My brother Riddell, in his reasons, which I have had the pleasure of perusing, thinks that there was justification under the statute for the killing, as it took place after sunset on the 1st July, on a farm where sheep were kept. With great respect, I am not able to agree. The evidence seems to me quite clear that the dog was shot before sunset.

After the position taken by the defendants' counsel at the trial, when and where the evidence was in the mind of Judge and witnesses, I do not think it open to the defendants to fall back upon R.S.O. 1897, ch. 271. All that is open to the defendants

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is the defence, if any, under the by-law mentioned. The municipal council of the township of Hillier had power, under the Consolidated Municipal Act, 1903, sec. 540, sub-secs. 1 and 2, to pass this by-law, which may be considered as a by-law restraining and regulating the running at large of dogs, and for killing dogs running at large contrary to the by-law. The defendants must justify, by strict proof, the act of killing. I do not agree with the proposition laid down by the learned trial Judge that a by-law passed under the authority of the Municipal Act can only justify the killing of dogs found running at large in a street or other public place. When a dog is found in a street or other public place, and not accompanied by the owner or some member of the owner's family, at a greater distance than half a mile from the premises of the owner, the dog shall be deemed to be running at large, and the onus of proof to the contrary is put upon the owner of the dog; but, when not in a street or public place, &c., &c., the onus of proof to justify is entirely upon the person killing. The defendants, to succeed, must prove that the plaintiff's dog was found unaccompanied, &c., &c., on the defendants' premises, at a greater distance than half a mile from the premises of the plaintiff, and that the defendant killing the dog was a resident ratepayer of the municipality.

The questions are questions of fact; and the trial Judge has not found in the defendants' favour upon all of these questions; and, in my opinion, this Court ought not to interfere with the findings of fact.

Then, as a matter of law, it seems to me an entire misapplication of the by-law, by it to justify the killing of the plaintiff's dog under the circumstances given in the evidence. The dog was not at first found on the defendants' premises. He was seen upon the road, apparently having taken to the road from his master's home, although the defendants did not know that; but the defendants did know that the farm was occupied. The dog was walking from the west toward the east, quietly on the road—he stopped once and turned back, perhaps, as suggested, because he heard the opening or closing of a door. He then turned east, for the younger defendant saw him go upon the defendants' premises and continue easterly along the east and west fence, not acting like a stray dog, not “giving tongue,” apparently per-



fectly harmless—and, when turning to the south, but continuing easterly, he was wantonly shot. The dog was apparently sent from home to meet his master.

A strict application of the by-law would permit the shooting, by a resident ratepayer, of a dog which, having followed his master for a distance of one half a mile, was left outside the door upon a neighbour's premises. That was not the intention of the law; and, if a strict application of the words of the by-law is insisted upon by the defendants, then there should be a strict application as to where the dog was "found." He was found in the sense of being seen walking or running on the highway, as he was on the defendants' premises; and, when on the highway, he was within the distance of half a mile from his master's home.

In my opinion, the appeal should be dismissed with costs.

FALCONBRIDGE, C.J.:—I agree in dismissing the appeal with costs.

RIDDELL, J.:—The plaintiff, a farmer in Prince Edward county, owned a half-bred collie. The dog was of more than ordinary intelligence, very much of a house-dog, a good watch-dog, and useful about the farm. Both the plaintiff and his wife estimate his value as at least \$300, and in that estimate they are backed up by at least one neighbour, while another thinks he was worth \$250. It is true that other neighbours consider that \$25 or \$30 would be more like the proper figure—pups, it is said, being worth about \$10 a dozen, and it not being a matter of much difficulty to raise and educate such animals. It is not without precedent that a man thinks his neighbour's dog nothing but a cur anyway, and more of a nuisance to everybody than a benefit to any one. However that may be, the evidence was amply sufficient to justify the finding of the Court below that the dog was worth \$125; and we could in no case interfere with the judgment in that respect.

In the afternoon of the 1st July, 1911, the plaintiff was away from home; his wife took the dog with her and went toward her mother's; turning back, she allowed the dog to go on along the road to meet his master.

He made his way along the road for a piece, and then went "snooping along the fence" of the defendant Hamilton Collins,

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who saw him so snooping "as a tramp dog would do." ("Snooping," I may say, is defined by the defendant as "crouching along in a sneaking way"). If he had gone on, he would have got among the defendant's sheep, and the defendant was suspicious of the dog, as he had lost sheep by dogs and had had several bitten and wounded some time before. When the dog saw or heard the defendant, he started to go back. The younger defendant, the son of Hamilton Collins, recognised him as a dog he had seen eight or ten days before, terrifying the sheep—he would not say "chasing the sheep," because, with admirable accuracy, he says, "I can't tell you what was in the dog's head"—but "running through the field terrifying the sheep." The young man got his gun and shot the dog dead in his tracks, because, as he says, "I was afraid he would do harm to our sheep."

The place at which the dog was shot and where he fell was on Collins's farm—the defendants dug a hole close to where the dog lay, and "the dog rolled over in the hole." It was argued for the plaintiff that the grave was some distance away from where the dog was shot, but this is not justified by the evidence—farmers do not as a rule go farther than is necessary to get rid of a carcass—and the words are not "rolled over and over," as they would be if the contention of the plaintiff's counsel were correct.

The plaintiff brought his action in the County Court of the County of Prince Edward, and, after trial before the Judge without a jury (characterised perhaps with more than the usual amount of forensic acerbity), he directed judgment to be entered for the plaintiff for \$125 and costs.

The defendants now appeal both as to quantum and otherwise.

So far as the quantum is concerned, leaving aside all sentimental damages (and that these are great is shewn, amongst other things, by the fact that the dog's dead body was dug up by his master and buried near his own home), there is, as I have said, ample evidence to justify the estimate of the learned County Court Judge, even if the animal was a mongrel, as contended by the defendants.

Whether the plaintiff is entitled to damages at all depends upon the law, which was canvassed before us with great care, skill, and erudition.

At the common law it is correctly said: "To kill . . . another man's dog without legal justification is an actionable wrong . . . It is no legal justification that the dog was trespassing. In order legally to justify such an act it must be proved that it was done under necessity for the purpose of protecting the person or saving property in peril at the moment of the act." Halsbury's Laws of England, vol. 1, p. 395, sec. 857.

No doubt, in the present case, the dog was trespassing—why does not appear, unless indeed he was in search of a *lectus genialis*, as suggested by the learned County Court Judge. But there was no present or any danger to person: and before the fatal shot all danger—even all apparent danger—to the sheep was over for the time being: the dog had turned back and was no longer on his way toward the sheep.

The defendants rely upon the statute and a by-law of the township.

The statute R.S.O. 1897, ch. 271, sec. 9 (c), provides: "Any person may kill . . . any dog which any person finds straying between sunset and sunrise on any farm whereon any sheep or lambs are kept." The learned Judge does not deal with this statute: but I think it affords a perfect defence to the action. Notwithstanding the evidence of Hamilton Collins, I think it fairly established by other evidence that it was after sunset that the dog was killed—the dog was found straying, and it was on a farm whereon sheep were kept.

But, in any case, the by-law, in my view, is sufficient to protect the defendants.

By-law No. 14 reads (sec. 2): "It shall not be lawful for any dog to run at large unaccompanied by its owner or by some member of such owner's family; and any dog, except hounds, . . . found so running at large at a greater distance than one-half mile from the premises of its owner, and unaccompanied therewith, may be killed by any resident ratepayer of this municipality."

This by-law was passed on the 22nd March, 1911, under the provisions of the Municipal Act of 1903, 3 Edw. VII. ch. 19, sec. 540:—

"By-laws may be passed by the councils of the municipalities . . . for the purposes . . .

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"1. For restraining and regulating the running at large of dogs; and for seizing and impounding dogs running at large contrary to the by-laws: and for selling the dogs so impounded . . . .

"2. For killing dogs running at large contrary to the by-laws.

"(a) For the purpose of the two next preceding paragraphs a dog shall be deemed to be running at large when found in a street or other public place and not under the control of any person . . . ."

The Act 1 Geo. V. ch. 57, sec. 8 (2), referred to as amending this section, was not in force at the time of the passing of the by-law; it came into force two days thereafter, *i.e.*, on the 24th March, 1911—and, in any event, it is not material in the present case.

In the note in Biggar's Municipal Manual to this sec. 540, it is said (p. 603): "The validity of laws providing for the forfeiture or destruction of property without compensation to the owners, has been doubted." I know of nothing justifying such a statement, or justifying such a doubt if expressed—but, however that may be, there cannot now be any doubt whatever as to the power of the Legislature: *Florence Mining Co. v. Cobalt Lake Mining Co.* (1908), 18 O.L.R. 275, at p. 279—"If it be that the plaintiffs acquired any rights . . . the Legislature had the power to take them away. . . . And there would be no necessity for compensation to be given. We have no such restriction upon the power of the Legislature as is found in some States."

The chief objection to the by-law, that to which effect was given in the Court below, is based upon the sub-clause (a). This was introduced for the first time by (1903) 3 Edw. VII. ch. 18, sec. 107. It is contended that it was intended to contain and does contain an exhaustive definition of "running at large"—and that, within the meaning of the section, a dog cannot be "running at large" unless it is "found in a street or other public place."

The result of such an interpretation would be alarming. A dog would not be at large and might roam with impunity miles away from his master's home and his master, traverse hill and dale, meadow and orchard—he might run free through the forest, pursuing at will squirrel and groundhog, not see or be seen by his master or any other person for months—and still, so long as he



kept off street and public place, he would not be "running at large." Being pursued on the road, he would, if he were a wise dog, dodge through the fence upon a farm and forthwith cease to be running at large. One does not like to contemplate the tragedy of such an animal trusting to the accuracy of a survey and sitting in fancied security a foot or two beyond the apparent line of the street, and than shot with impunity because an accurate survey shewed that the true line ran a few inches beyond him. A dog traversing the country would alternately be, and not be, running at large, as he crossed the road or got through the fences.

The Legislature, no doubt, had the power to effect such a curious result: but, before an interpretation resulting in such an absurdity be adopted, we should be sure that this is their meaning. The absurdity amounts to a repugnance, in my view; and, on every canon of construction, the proposed interpretation should be rejected if at all possible.

In *The Duke of Buccleuch* (1889), 15 P.D. 86, Lindley, L.J. says (p. 96): "You are not so to construe the Act of Parliament as to reduce it to rank absurdity." See also *Simms v. Registrar of Probates*, [1900] A.C. 323, at p. 335, *per* Lord Hobhouse; *The Queen v. Tonbridge Overseers* (1884), 13 Q.B.D. 339, at p. 342, *per* Brett, M.R.; *Christophersen v. Lotinga* (1864), 33 L.J. C.P. 121, 123, *per* Willes, J.; *Nuth v. Tamplin* (1881), 8 Q.B.D. 247, at p. 253, *per* Jessel, M.R.; *Miller v. Salomons* (1852), 7 Ex. 475, *per* Parke, B., at p. 553; and such cases.

The expression, "running at large," is well known; it has been applied to horses and cattle, *e.g.*, R.S.C. 1906, ch. 37, secs. 294, 294 (3). The cases on this section and its predecessors are collected in *Sexton v. Grand Trunk R.W. Co.* (1909), 18 O.L.R. 202. And many other cases on similar statutes will be found cited in "Words and Phrases," vol. 1, pp. 604-607. No abstract rule could be laid down applicable to every case as to the nature, character, and extent of the absence of restraint within reasonable limits; it was a question of fact in each case.

In my opinion, the Legislature, by the amendment of 1903, simply intended to remove from the realm of controversy the question whether a dog was running at large in the one case, and to lay down as a matter of law that, when a dog was "found in a street or other public place . . . not under the control of

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any person," he was running at large: and it must be so held: *Re Rogers and McFarland* (1909), 19 O.L.R. 622. But no other case is provided for; and in any other case the question of running at large *aut non* remains a question of fact. Clause (a) is not, like a mathematical definition, convertible—there is no provision that no other shall be considered running at large than those in the street, &c.; and I cannot think that the Legislature intended, by introducing this clause, to limit the power previously given to the municipalities.

It was argued that where the dog was killed was not half a mile from the premises of his owner—but the distance was measured, and it was found that, even as the crow flies, the distance from the nearest point of the plaintiff's field to the place where the dog was when shot was eleven and a half feet over half a mile.

The learned County Court Judge seems to be rather of the opinion that, as the dog was seen running for some distance before he was shot, he was "found" when he was first seen, and consequently he was "found" less than half a mile from his owner's premises, and so could not have been found where and when he was shot. This, with much respect, is quite too subtle. I may find a man in my house, though I saw him go in, a dog in my garden, though I saw him jump the fence—and one arrested in the street for being there found drunk and disorderly would hardly be acquitted because the policeman saw him coming down his own walk from his house drunk and howling.

Although I do not think authority is necessary for the construction—I refer to a few. In *Regina v. Lopez* and *Regina v. Sattler* (1858), 7 Cox C.C. 431, it was held that a person is "found" wherever he is actually present; and in *Jowett v. Spencer* (1847), 1 Ex. 647, a mineral is "found" where "it is ascertained to lie and be." See also such cases, as *Simmons v. Millingen* (1846), 2 C.B. 524; *Griffith v. Taylor* (1876), 2 C.P.D. 194.

The by-law itself may be subject to criticism; it is not quite what a careful draftsman would make it; it would seem to require the premises of the owner to accompany the dog; but the "there-with" must, I think, in view of the earlier provisions in the section, be interpreted as meaning "by its owner or some member of such owner's family." With this interpretation, the by-law is well enough.

I think the appeal must be allowed; and, in view of the perfectly reasonable suspicions of the defendants as to the dog, and the absence of any improper conduct on their part either before or after the beginning of the action, I think they should have their costs both in this Court and in the Court below.

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*Appeal dismissed; RIDDELL, J., dissenting.*

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[DIVISIONAL COURT.]

RENAUD v. THIBERT.

*Division Courts—Increased Jurisdiction—Division Courts Act, 10 Edw. VII. ch. 32, sec. 62—Ascertainment of Defendant's Liability and Amount thereof—Proof of Document—Proof of Title—"Other and Extrinsic Evidence."*

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Section 62 of the Division Courts Act, 10 Edw. VII. ch. 32, provides that a Division Court "shall have jurisdiction in . . . (d) an action for the recovery of a debt or money demand where the amount claimed, exclusive of interest . . . does not exceed \$200 and the amount claimed is (i) ascertained by the signature of the defendant . . . An amount shall not be deemed to be so ascertained where it is necessary for the plaintiff to give other and extrinsic evidence beyond the production of a document and proof of the signature to it:"—

*Held*, that, in making the provision contained in the last clause, it was the ascertainment of the defendant's liability under a document and the amount of such liability that the Legislature had in view, and not the matter of the plaintiff's interest in or right to the document by which the liability is ascertained.

*Held*, therefore, that the jurisdiction of the Division Court was not ousted because the plaintiff, in an action to recover \$200 and interest upon a covenant in a mortgage-deed executed by the defendant, had to establish by other than documentary evidence his right to sue upon the covenant, notwithstanding that he had assigned the mortgage.

APPEAL by the defendant from the judgment of the Junior Judge of the County Court of the County of Essex, in favour of the plaintiff, for the recovery of \$260, in a Division Court action upon a covenant in a mortgage made by the defendant to the plaintiff.

The mortgage had been assigned by the plaintiff to one Meloche, by an assignment absolute in form, but which, as the trial Judge found, was not intended to be absolute, but a collateral security only for an advance by Meloche, who was made a defendant in the action.

At the trial, the plaintiff produced a document purporting to be a reassignment of the mortgage from Meloche to the plaintiff, but failed to prove that it was executed by Meloche or under his authority.

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June 19. The appeal was heard by a Divisional Court composed of MEREDITH, C.J.C.P., TEETZEL and KELLY, JJ.

*J. H. Rodd*, for the defendant, argued that the Division Court had no jurisdiction to try the action, as the amount of the claim was not ascertained by the signature of the defendant, within the meaning of the statute 10 Edw. VII. ch. 32, sec. 62—other than documentary evidence being required in order to shew that the assignment to Meloche was merely collateral. He also argued that the claim was barred by the Statute of Limitations, and that the order of the Judge directing a new trial, after a judgment by default, had been unduly limited, and was irregular.

*F. D. Davis*, for the plaintiff, argued that the new trial had not been limited, as alleged, to proving the re-assignment of the mortgage, which it was unnecessary for the plaintiff to maintain, as the original assignment was only by way of collateral security, and he was entitled to prove that fact, as he had done, without ousting the jurisdiction. He referred to *Dawson v. Graham* (1877), 41 U.C.R. 532; *Prittie v. Connecticut Fire Insurance Co.* (1896), 23 A.R. 449, 453; *Hostrawser v. Robinson* (1873), 23 C.P. 350.

[MEREDITH, C.J., referred to *Slater v. Laberee* (1905), 9 O.L.R. 545].

*Rodd*, in reply, cited *Ward v. Hughes* (1884), 8 O.R. 138, at pp. 143, 144.

August 20. TEETZEL, J. (after setting out the facts as above):—The only question upon which judgment was reserved at the argument was, whether the learned Judge had jurisdiction to try the action under sec. 62 of the Division Courts Act, 10 Edw. VII. ch. 32.

Jurisdiction of the Division Court was first extended to claims for \$200 by 43 Vict. ch. 8, sec. 2, and the extended jurisdiction was made to embrace “all claims for the recovery of a debt or money demand, the amount or balance of which does not exceed \$200, and the amount or original amount of the claim is ascertained by the signature of the defendant or of the person whom, as executor or administrator, the defendant represents.”

This provision was amended by 56 Vict. ch. 15, sec. 2, by making a provision that interest accumulated upon any such claim should not be included in determining the question of



jurisdiction, but that the same might be recovered in addition to the claim, notwithstanding that the interest and the amount of the claim so ascertained together exceed \$200.

There were many conflicting decisions as to the principle of construction of the word "ascertained" in the Act conferring the extended jurisdiction, and the leading ones are reviewed in *Kreutziger v. Brox* (1900), 32 O.R. 418, where the learned Chancellor, in delivering the judgment of a Divisional Court, lays down the following as the proper construction to be applied: "The amount of the claim is ascertained by the signature of the defendant if it is thereby *made certain*, *i.e.*, if upon proof of the signature the liability is established. If other and extrinsic evidence is required, such as to shew completion of the contract—in the case of a signed building contract to pay so much for a house—the stipulated price is not ascertained by the mere evidence of contract. The jurisdiction of the Division Court is extended to cases where the balance claimed on such an ascertained amount does not exceed \$200, but it was not intended in such cases to throw open in the lower forum disputed matters as to the proper completion of the contract—the due fulfilment of all conditions and the like."

By 4 Edw. VII. ch. 12, sec. 1, the Act was amended by adding the following section: "72a. The amount or original amount of the claim shall not be deemed to be ascertained by the signature of the defendant or of the person whom, as executor or administrator, the defendant represents within the meaning of clause (d) of sub-section 1 of section 72, when in order to establish the claim of the plaintiff or the amount which he is entitled to recover, it is necessary for him to give other and extrinsic evidence beyond the mere production of a document and the proof of the signature to it."

The effect of this section is, apparently, to declare the law to be as laid down in *Kreutziger v. Brox*; but it clearly, I think, was not intended to narrow the jurisdiction already conferred.

In sec. 62 of the revised Division Courts Act, *supra*, the language of the amendment of 1904 is altered by omitting the words "in order to establish the claim of the plaintiff or the amount which he is entitled to recover," and it now reads: "An amount shall not be deemed to be so ascertained where it is necessary for the plaintiff to give other and extrinsic evidence

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beyond the production of a document and proof of the signature to it."

The presence in the statute of 1904 of the words omitted in 1910 led to the suggestion in the argument of *Slater v. Laberee* (1905), 9 O.L.R. 545, that the presence of those words was intended to limit the jurisdiction of the Division Court in a case of that kind; but in that case, which was an action upon a promissory note, it was held that where the production of the note and the protest and the proof of the signature would *primâ facie* entitle the plaintiff to recover, the case is brought within the jurisdiction of the Division Court; and at p. 547, the judgment proceeds: "It is not for us to determine whether upon proof of the endorsement without more the plaintiff would be entitled to recover. If the plaintiff is not entitled to recover without more, then, if it should become necessary for the learned Judge to enter upon a further inquiry and to take evidence for the purpose of shewing some ground for making the defendant liable, in all probability his jurisdiction would be ousted and he would be bound to stop the further trial of the action; but upon the first question, that is, whether upon the face of the instrument the defendant is liable, that is for the Division Court and not for us." And further on: "The order must be framed so as to make it clear that we are not directing a trial if extrinsic evidence is necessary in order to make the defendant liable."

Now in this case it is plain that upon the production of the mortgage signed by the defendant, and the time for payment thereunder having passed, *the defendant is primâ facie liable to the owner of the mortgage*, and it would not be necessary for the plaintiff to give other or extrinsic evidence beyond the production of the mortgage and the proof of the defendant's signature in order that the amount of such liability might be said to be "ascertained."

The question in this case is, does the fact that, in order to establish the plaintiff's right to sue in his name on the covenant, he must establish by evidence other than documentary that the assignment was only by way of collateral security, oust the jurisdiction of the Division Court? I am of opinion that it does not.

It seems to me that, in making the provision as to proof, it was the ascertainment of the defendant's liability under a document

and the amount of such liability that the Legislature had in view, and not the matter of the plaintiff's interest in or right to the document by which the same are ascertained.

In every action upon a document, if the plaintiff does not appear on the face of it as the person entitled, he must establish his title by other evidence, which may not always be documentary. The holder of a note, in an action against the payee as endorser, would have to prove by oral evidence the facts of presentment and dishonour, in the absence of a notarial certificate of those facts. A surviving member of a partnership, suing in his own name upon a note or other written agreement for payment of money, would have to prove the death of the other members of the firm to shew his title by operation of law.

Besides these instances and cases like the one now being considered, it may often happen that a plaintiff cannot establish his title to the document sued on by documentary evidence only. To hold that he cannot, for that reason, avail himself of the increased jurisdiction of the Division Court, notwithstanding that he is able to ascertain and establish the defendant's liability and the amount thereof under the document, by its production and proof of his signature, would be to make the statute a dead letter in many cases.

Once the production of the document and proof of its execution establish the liability of the defendant to the owner thereof and ascertain the amount of such liability without the necessity of other and extrinsic evidence to establish either, I think there is nothing in the statute or in any of the cases decided upon it which suggests that evidence to establish the plaintiff's title would be "other and extrinsic evidence" in contemplation of the statute. The appeal should be dismissed with costs.

KELLY, J.:—The question for determination in this appeal is, whether, under the circumstances, there was jurisdiction, under sec. 62 of the Division Courts Act, 10 Edw. VII. ch. 32, to try the action in the Division Court.

By that section jurisdiction is given to Division Courts in "an action for the recovery of a debt or money demand, where the amount claimed, exclusive of interest . . . does not exceed \$200, and the amount claimed is . . .

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“(i) ascertained by the signature of the defendant or of the person whom as executor or administrator he represents or

“(ii) the balance of an amount not exceeding \$200, which amount is so ascertained,” etc.

The section also declares that an amount shall not be deemed to be so ascertained where it is necessary for the plaintiff to give other and extrinsic evidence beyond the production of a document and proof of the signature to it.

This, in my view, has reference to cases where, the document being produced and the signature proven, something further is necessary to shew the liability of the defendant thereunder—such, for instance, as proving the fulfilment of a condition on which the document was to take effect—and does not apply to evidence necessary to establish the plaintiff's status with reference to the document.

If the document be produced, and if the signature of the defendant, or of the person whom as executor or administrator he represents, be proven, and if there be no further evidence necessary to shew the completion of the transaction, so far as the person signing it is concerned, then there is an ascertainment within the meaning and intention of sec. 62.

Giving this interpretation to that section, I am of opinion that the appellant cannot succeed, and that the appeal should, therefore, be dismissed with costs.

MEREDITH, C.J.:—I agree in the conclusion to which my learned brothers have come.

*Appeal dismissed.*



## [DIVISIONAL COURT.]

## TRAVIS V. COATES.

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August 20.

*Principal and Agent—Agent's Commission on Sale of Land—Purchaser Found by Agent—Refusal to Carry out Purchase—Subsequent Purchase through another Agent—Causa Causans or Causa sine quâ non—Intention of Purchaser.*

To determine whether a land broker is entitled to a commission on a sale of land, the test is, "Was the relation of buyer and seller really brought about by the act, however trifling, of the agent?" If so, he is entitled to commission, although the actual sale has not been effected by him. But if, notwithstanding an original introduction by the agent, his act is not the real and efficient cause of the sale, he cannot recover.

The plaintiff was employed by the defendant to find a purchaser for her land; he found a purchaser, J.; and an oral agreement of sale and purchase was made, but J. declared it off. The defendant then placed the property in the hands of another agent. J.'s wife made inquiry of the new agent about the property, saying she had seen it; and, after negotiations with the new agent, a sale was made to J., on practically the same terms as had been arranged through the plaintiff. The trial Judge found that J. never abandoned his intention to buy:—

*Held*, that it could not be considered that J.'s intention was to buy on the basis of the arrangement made through the plaintiff; his intention, if any, was to enter into new negotiations and buy if he could make satisfactory terms; and the case must be considered as if J. had no intention in the matter, but had simply refused to carry out his purchase.

And *held*, that, though the plaintiff's services were *causa sine quâ non*, they were not *causa causans* of the sale; and the plaintiff was not entitled to a commission.

Review of the authorities.

*Taplin v. Barrett* (1889), 6 Times L.R. 30, followed.

*Wilkinson v. Alston* (1879), 41 L.T.R. 394, 48 L.J.Q.B. 733, explained and distinguished.

Judgment of DENTON, Jun. Co.C.J., reversed.

AN appeal by the defendant from a judgment (2nd May, 1912) of DENTON, Jun. J. Co. C. York, in an action tried by him (30th April), without a jury, in the County Court of the County of York.

The following statement of the facts is taken from the judgment of RIDDELL, J.:—

The facts are not complicated, but the result of the judgment, if it is to stand, would be that for the owner of real estate as soon as he wishes to sell it, the proverbial inevitable evils become a triad, and "there is nothing sure but death, taxes, and agents' fees".

I set out the facts, as I understand them, giving references where I add to or vary the findings of the learned trial Judge.

The defendant owned a house known as No. 116 Curzon street, in Toronto, which was heavily incumbered. Mr. Ponton, a real estate agent, was acting for the mortgagee (p. 50,) and

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foreclosure was imminent. The defendant then put the property into Ponton's hands as sole agent for sale (p. 47 etc.): Ponton seems to have made some attempt to sell, but did not succeed.

The plaintiff is a real estate agent, and, some time in August, 1911, got into communication with one J. J. Jerou, a prospective purchaser on behalf of his wife. The plaintiff went to the defendant and asked her if she would sell her house, and, if so, upon what terms, as he had a purchaser in view. The defendant then authorised the plaintiff to obtain a purchaser, on the usual terms as to commission. The price first asked was \$5,000. Jerou at first offered \$4,200, and finally the parties came together, and the defendant agreed to sell and Jerou to buy at \$4,600, on terms of \$3,000 cash and the balance on mortgage. Jerou was in a rented house and had to move, and one of the conditions of the sale by the defendant was that he should get possession by the 15th September, 1911. Jerou signed nothing, and could not, therefore, be compelled to carry out the contract.

Jerou took the matter of getting possession into his own hands; he was attending to the matter of obtaining possession himself (p. 41), and he told his solicitor that, if he could not get possession by the 19th September, he would not take the property. Jerou went to the property, and it was arranged that he should get possession on the 19th; and, at the cost of considerable inconvenience, everything was out of the house and the property ready for him by that day (Vernon Coates's evidence). But Jerou did not take possession, he made some complaint about the title, which was absolutely groundless, as appears by his own solicitor's evidence. He suggested taking the house for a month as tenant (p. 65), and, if he thought it was fit, he would take and buy the house. The defendant saw the plaintiff about the matter, as did her son (pp. 57, 58, 65); to the son he said, "There is a flaw in the sale" (p. 65); to the defendant, "Well, the sale is off for some flaw in the title" (p. 58).

The solicitor for Jerou was waiting to be put in funds by Jerou, and was in a position to close the sale if he had received the funds (p. 39). He had been instructed not to carry out the transaction unless possession was given by the 19th September (p. 40). On being called upon by the vendor's solicitor on the 19th to close the sale, he replied that he had no funds, and the next day Jerou

telephoned him not to carry it out (p. 40), not to close (p. 46), he was not going on with the deal (p. 46). The defendant did not let the house to Jerou; but, thinking, and justifiably thinking, that the deal was off, she went again to Mr. Ponton and reappointed him (p. 51)—instructed him to try and sell it again, as he puts it.

About the 27th December, Mrs. Jerou, apparently without the knowledge of her husband, came into Ponton's office and made inquiry about the property—she said she had seen it—and it was arranged that Ponton's representative, Dunlop, should call and see Mr. Jerou in the evening. He did so: and negotiations commenced, Dunlop asking a rather high price. The Jerous then said they had been offered the property for \$4,600; and Dunlop agreed to submit that figure—he saw the defendant, the terms were accepted and a contract signed, without much, if any, delay. The sale was carried out on practically the same terms as had been arranged through the plaintiff.

The plaintiff had, on the 27th September, rendered his bill to the defendant for \$115 (exhibit 5); and her solicitors had, the next day, written an answer, "You are, no doubt, aware that Mr. Jerou declined to purchase;" and no reply was made by the plaintiff.

After the sale in December, the defendant paid Ponton a commission for the sale; on the 15th February, 1912, the plaintiff issued his writ; the trial Judge has given him judgment for \$115 and costs; and the defendant now appeals.

June 20. The appeal was heard by a Divisional Court composed of MEREDITH, C.J.C.P., RIDDELL and KELLY, JJ.

*C. A. Moss*, for the defendant, argued that the plaintiff was not entitled to commission, as he had failed to secure a binding contract from the purchaser, and the service he rendered was merely of a casual nature, and too remote to put him in the position of effective cause of the sale, which was brought about through the intervention of another agent, to whom the commission had been paid. *Copeland v. Wedlock* (1905), 6 O.W.R. 539, is distinguishable. He referred to Halsbury's Laws of England, vol. 1, p. 195; *Rice v. Galbraith* (1912), 26 O.L.R. 43; *Imrie v. Wilson* (1912), 3 O.W.N. 1145, where *Stratton v. Vachon* (1911), 44 S.C.R. 395, is com-

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mented on; *Singer v. Russell* (1912), 25 O.L.R. 444; Evans on Remuneration of Commission Agents, 2nd ed., pp. 2, 108-113, where *Barnett v. Brown and Co.* (1890), 6 Times L.R. 463, and other cases are cited.

*T. N. Phelan*, for the plaintiff, relied upon the finding of the trial Judge that his client was the *causa causans* in bringing about the sale. It was really a question of fact, decided on the evidence by the trial Judge, and his view should prevail. There was no such unreasonable delay in carrying out the sale as would justify the conclusion that the purchaser had dropped his original intention to purchase. He referred to *Green v. Bartlett* (1863), 14 C.B.N.S. 681, and *Sager v. Sheffer* (1911), 2 O.W.N. 671.

*Moss*, in reply.

August 20. The judgment of the Court was delivered by RIDDELL, J. (after setting out the facts as above):—The trial Judge finds that Jerou never abandoned his intention to buy—that may be so; I doubt it, but certainly he gave his solicitor to understand that the sale was off; the plaintiff gave the defendant to understand that the sale was off. No intimation was given to any one by Jerou that the sale was not off—and, if he had still the intention to buy, he carried that around in his head without making any external or visible manifestation of its existence, and “*de non apparentibus et de non existentibus eadem est ratio.*” The plaintiff cannot set up that the sale was not off, that Jerou had not refused to purchase; he told the defendant that the sale was off, and the defendant acted accordingly.

It cannot, in any event, I think, be considered that the intention, if any, which Jerou had in reference to this property was to buy on the basis of the arrangement made through the plaintiff, but to enter into new negotiations and buy if he could make satisfactory terms.

It is, to my mind, in every respect, as though he had no intention in the matter, but had simply refused to carry out his purchase.

So far as the facts before December go, there can be no doubt that the plaintiff could not recover; but it is contended that the subsequent sale, through Ponton, to the same purchaser, entitled the plaintiff to his commission. It may be at once admitted that



the sale to Jerou would probably not have been effected had it not been for the plaintiff's retainer by the defendant and his efforts. No doubt, the plaintiff's services were a *causa sine quâ non* (to use the time-honoured terminology): but that is not enough—the services must be a *causa causans*.

In *Imrie v. Wilson*, 3 O.W.N. 1145, the defendant agreed to pay the plaintiff a commission if he sold certain property; the plaintiff introduced K. to the owner as a purchaser; K. was unable to purchase, but agreed with the defendant that he should try to sell for him as an agent, and did so. Mr. Justice Clute held that the plaintiff could not succeed, and this was sustained by a Divisional Court (3 O.W.N. 1378). "No doubt," says my learned brother (3 O.W.N. at p. 1147), "the introduction by Stinson (one of the plaintiffs) of K. to Wilson was the cause without which the sale would not have been effected: but was it the *causa causans*, or was there a new and distinct act which intervened which really brought about the sale? . . . It required a new act to procure a purchaser: in short, the plaintiffs' acts were not the effective cause of the sale which actually took place. The most that can be said is, that the introduction was merely a *causa sine quâ non*."

Not wholly unlike and really the converse of that case is *Barnett v. Isaacson* (1888), 4 Times L.R. 645. The plaintiff was to introduce to the defendant a purchaser of the business; he introduced one C., an accountant, to find a purchaser; C. did not find a purchaser, but bought on his own account. The plaintiff sued, but was held not entitled to recover.

The test is, "Was the relation of buyer and seller really brought about by the act, however trifling, of the agent?" If so, "he is entitled to commission although the actual sale has not been effected by him:" *Green v. Bartlett*, 14 C.B.N.S. 681, 685. And, accordingly, in *Steere v. Smith* (1885), 2 Times L.R. 131, where an agent took one H. to the owner and introduced him, although H. did not then make any offer but took a house in the same street, still, when H. ultimately did buy from the owner, the agent was held by Field, J., entitled to his commission. That right is not lost even by the discharge of the agent and withdrawal of the lands from his hands before the sale, if his acts before this were

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the efficient cause of the sale: *Wilkinson v. Martin* (1837), 8 C. & P. 1; and see *per* Lord Coleridge, C.J., in *Lumley v. Nicholson* (1885), 2 Times L.R. 118, at p. 119.

But if, notwithstanding an original introduction by the agent, his act is not the real and efficient cause of the sale, he cannot recover. In *Gillow and Co. v. Lord Aberdare* (1892), 9 Times L.R. 12, the agent was to let a house or sell the ground lease. He did procure a lessee in one T. for the same, but T. refused to deal with him for the ground lease, and dealt with another agent. It was held by Hawkins, J. (8 Times L.R. 676), that he could not recover, and this was sustained by the Court of Appeal. Lord Esher, M.R., said (9 Times L.R. 12): "The sale . . . had not been brought about by the introduction of the plaintiffs, with whom . . . T. . . . had refused to have any dealings, but had been the result of independent action on his part in going to another firm of house agents . . . ". In this case T. had said to the plaintiffs, in language not unlike that of Jerou, that, if he liked it, he might buy it.

A case more like the present is *Taplin v. Barrett* (1889), 6 Times L.R. 30. The defendant employed the plaintiffs, a firm of house agents, to sell a house on commission. The plaintiffs introduced S. as a possible buyer, but he made certain stipulations and did not complete the purchase. Then the defendant put the property in the hands of a firm of auctioneers, who put it up for sale by auction, and S. bought at the auction sale. The County Court Judge held that the plaintiffs could not recover, and the Divisional Court sustained that view, saying, *per* Wills, J., "that it was doubtful whether but for the auction S. would have bought at all," and holding that the only right of action the plaintiffs had was for revocation of authority. Mathew, J., points out that the contention of the plaintiffs would render the defendant liable for two commissions, one to the plaintiffs and the other to the auctioneers. Nothing turned in that case on the fact that the agents employed, after the failure of S. to complete his purchase, were auctioneers—and I am unable to distinguish the two cases.

The proposed sale to Jerou fell through, the owner of the property put the property into the hands of another agent, the previous agent did nothing more, and the new agent effected a sale. The "intention" of Jerou to buy the property some day if it

suit him—if that intention did in fact exist—probably shared his mind with the “intention” to buy any other property if it suited him; and, were it even less vague than it is, is no more effective than the expressed intention of T. in the case of *Gillow and Co. v. Lord Aberdare*. Nor is the fact that in the present case the purchaser went herself to the new agent of any more significance than that T. went to the new agent in that case.

*Wilkinson v. Alston* (1879), 41 L.T.R. 394, 48 L.J. Q.B. 733, has been said to lay down a different principle, and it was much relied upon in the argument in the Divisional Court on the appeal in *Imrie v. Wilson*. But I do not think that can be successfully contended. In that case the plaintiff agreed that if the defendant should introduce a person who would become the purchaser of a ship of the defendants, he should receive a commission. In February he introduced one T. (who had been recommended to buy the ship by one W.), and the plaintiff and defendant agreed that if T. did buy, the commission should be divided between the plaintiff and W. No sale was effected, the negotiation with T. went off. In March, W. mentioned the ship to one Wise, to the knowledge of the defendant, and wrote the plaintiff to see Wise. Nothing was done by the plaintiff. In May, Wise, acting as broker, wrote direct to the defendant and introduced a principal, Learoyd, for whom he was agent, and who became purchaser. The plaintiff thereupon claimed his commission. Lush, J., thought that Wise was agent for the defendant, and that he would undoubtedly be entitled to commission from the defendant, and that “Wilkinson’s information to Wise must be taken to have been only the *causa causans*” (a plain misprint for *causa sine quâ non*), “and that is not enough”—also that “it cannot be said . . . , under these circumstances, that Wilkinson by his agent procured Learoyd to become the buyer. The chain of continuity was broken.” He, accordingly, dismissed the action. If the view of Lush, J., that Wise was the agent of the vendor, had been correct, this case would much resemble *Irmie v. Wilson*, already referred to, but it was held by the Court of Appeal that this view was not sound. The Court of Appeal held that the position of Wise was that of agent for the buyer, not agent for the vendor; that it was quite the same as though Wise were buying for himself—indeed, Bramwell, L.J., thought Wise was buying for himself—that, con-

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sequently, there was no breach of continuity, Wise having been introduced by the plaintiff and W., and a sale having resulted from this introduction. The appeal was allowed.

I can find nothing in the case, when the facts are examined, at all adverse to the view I take in the present case.

I think the appeal should be allowed and the action dismissed, both with costs.

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August 9.

RE CLARKSON AND WISHART.

*Execution—Interest of Certificated Holder of Mining Claim before Patent—Liability to Seizure and Sale—Mining Act of Ontario, 1908—Execution Act, 9 Edw. VII. ch. 47—2 Geo. V. ch. 8, sec. 7 (O.)*

The interest of the holder of an undivided share in a mining claim, for which a certificate of record has issued, but for which the purchase-money has not been paid and the patent has not been issued or applied for, is not exigible, or was not before the enactment of 2 Geo. V. ch. 8, sec. 7 (O.)

Provisions of the Mining Act of Ontario, 8 Edw. VII ch. 21, and of the Execution Act, 9 Edw. VII. ch. 47, considered; and the authorities reviewed.

Decision of the Mining Commissioner affirmed.

THE following statement of the facts is taken from the judgment of RIDDELL, J.:—

This is an appeal from the judgment of the Mining Commissioner in three cases (which may be treated as one, the same points arising for decision.)

One Wishart was the holder of an undivided interest in a mining claim, for which a certificate of record had issued, but which had not been patented, nor was the patent applied for nor the purchase-money paid. Judgment having been obtained against him by Clarkson, and a writ of *fi. fa.* issued, the judgment creditor took proceedings before the Mining Commissioner to be declared entitled to the interest of Wishart in the mining claim (sec. 72(2)). This application the Mining Commissioner refused.

Then the Sheriff proceeded to sell, as goods, the said interest, and made a deed; and the purchaser, Forgie, who holds and held a miner's license, endeavoured to have this deed recorded. The



Recorder refused; and Forgie appealed to the Mining Commissioner, who dismissed his appeal.

In the meantime, Wishart had transferred his interest to one Myer, pursuant to the Act, and this transfer was recorded. Forgie took proceedings to have this set aside—the Mining Commissioner refused.

The execution creditor and the purchaser at the Sheriff's sale (Forgie) now appeal—and the real question to be decided is, whether the interest of one in the position of Wishart is exigible, or rather was exigible before the recent Act, 2 Geo. V. ch. 8, sec. 7.

June 11 and 12. The appeal was heard by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.

*J. W. Bain*, K.C., and *M. L. Gordon*, for the appellants. The sole question is, whether an unpatented interest in a mining claim is exigible. The Sheriff sold, as goods, the interest of Wishart. Such an interest is a chattel interest, and as such is exigible; or it is such an interest in land as is exigible. So, first, we submit that this is a chattel interest exigible under a *fi. fa.* goods. Section 65 of the Mining Act of Ontario, 8 Edw. VII. ch. 21, makes a mining claim free from liability to impeachment or forfeiture except as expressly provided by the Act. Therefore, there is a term which cannot be determined by the Crown. See also *Sparrow v. Champagne* (1856), 5 C.P. 394; *Osborne v. Kerr* (1859), 17 U.C.R. 134, at p. 143. We then submit that this is such an interest in land as is exigible. It is at least a tenancy at will, which is a leasehold: Stroud's Judicial Dictionary, p. 2023; and the Execution Act makes a leasehold exigible. See sec. 67 of the Mining Act; the Execution Act, 9 Edw. VII. ch. 47, sec. 9, sub-sec. 1; 1 Geo. V. ch. 17, sec. 34, sub-sec. 6, amending the Execution Act; also Blackstone's Commentaries, book 2, pp. 385, 386; *Ronan v. King*, [1894] 2 I.R. 648. In support of our contention that this is an interest in land, we refer to *McIntosh v. Leckie* (1906), 13 O.L.R. 54. This is a *profit à prendre*, as well as a tenancy at will: *Canadian Railway Accident Co. v. Williams* (1910), 21 O.L.R. 472; *McLeod v. Lawson* (1906), 8 O.W.R. 213; *Wood v. Leadbitter* (1845), 13 M. & W. 838. "Land" includes an interest in land: Williams on Executors, 9th ed., p. 595; the Execution Act, 9 Edw. VII. ch. 47, sec. 17; *Tomkins v. Jones* (1889), 22 Q.B.D. 599, 602;

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Maxwell on the Interpretation of Statutes, p. 517; Craies on the Interpretation of Statutes, 2nd ed., p. 137. This interest is more than a tenancy at will: *Manchester Ship Canal Co. v. Manchester Racecourse Co.*, [1900] 2 Ch. 352, at p. 360; *Griffin v. Caddell* (1875), 9 Ir. C.L. 488. See also the following sections of the Mining Act: sec. 2, clauses (m) and (n); secs. 35, 65, 68, 84, 85, and 111.

*J. M. Godfrey*, for the respondent. Wishart's interest is not exigible. There was no way of getting on the books in the Mining Recorder's office a transfer by the Sheriff. Section 73 of the Mining Act is an effective answer to an application of an execution creditor to be recorded: *Reilly v. Doucette* (1911), 2 O.W.N. 1053; *Holmes v. Millage*, [1893] 1 Q.B. 551. The Sheriff has no rights under the Act, and so he could not sell; therefore, he could not seize: *Legg v. Evans* (1840), 6 M. & W. 36. This is a tenancy at will and nothing more. A tenancy at will is not assignable except by virtue of the Act. The forfeiture under sec. 65 is such a forfeiture as comes by reason of loss of status by the licensee. If the provisions of sec. 65 are inconsistent with sec. 68, they cannot stand. The very act of seizure destroys the tenancy at will; it severs it from the will. That is why it cannot be seized in execution: 17 Cyc. 954; Freeman on Executions, 3rd ed., sec. 119, p. 495. This is not analogous to a patent right: Halsbury's Laws of England, vol. 14, p. 47, sec. 95, note (a); *Ex p. Foss, Re Baldwin* (1858), 2 DeG. & J. 230. If this interest is an estate at all, it is an estate in land, and should not be sold as goods: *Duke of Sutherland v. Heathcote*, [1892] 1 Ch. 475, 483; Leith & Smith's Blackstone, p. 165. But I submit that it cannot be considered "land" within the meaning of the Execution Act. See sec. 32 (1) of the Execution Act, and sec. 8 of R.S.O. 1897, ch. 119. Then there has been subsequent legislation in 1912, 2 Geo. V. ch. 8, sec. 7, which supports my contentions.

*Bain*, in reply.

August 9. RIDDELL, J. (after setting out the facts as above):—The position of a licensee under the Mining Act is rather anomalous. He may (sec. 34) prospect on certain Crown lands without being or being considered a trespasser; if he discover valuable mineral, he may (sec. 35) stake out a claim in a certain specified form; but not more than three in any one division during a license year (sec. 53). Then he may (sec. 59) apply to have the

claim recorded; and, on certain conditions, he may (sec. 64) receive a certificate of record. Up to this time he has no right, title, interest, or claim in or to the mining claim other than the right to proceed to obtain a certificate of record and ultimately a patent (sec. 68), and he is a mere licensee of the Crown: but, after the issue of the certificate, he is a tenant at will of the Crown until he procures his patent (sec. 68).

He may transfer his interest in the claim to another licensee or may work the claim subject to the other provisions of the Act (sec. 35); this transfer *may* be in Form 11, but it "*shall* be signed by the transferor or by his agent authorised by instrument in writing" (sec. 72); and, "except as in this Act otherwise expressly provided, no transfer . . . affecting a mining claim or any recorded right or interest acquired under the provisions of this Act, shall be entered on the record or received by a Recorder unless the same purports to be signed by the recorded holder of the claim or right or interest affected or by his agent authorised by recorded instrument in writing, nor shall any such instrument be recorded without an affidavit (Form 12) attached to or endorsed thereon, made by a subscribing witness to the instrument" (sec. 73). But, after the issue of the certificate of record, "the mining claim shall not in the absence of mistake or fraud be liable to impeachment or forfeiture except as expressly provided by this Act" (sec. 65); though, if issued in mistake or obtained by fraud, "the Commissioner shall have power to revoke and cancel it on the application of the Crown or an officer of the Bureau of Mines, or of any person interested" (sec. 66).

To the application of the execution creditor to be recorded, I think sec. 73 is an effective answer: and that part of the appeal should be dismissed with costs.

And the same considerations apply to the application of Forgie to have his deed from the Sheriff recorded.

Whether the appeal against Myer's record is to succeed will or may depend upon both law and fact. The fact whether he had actual notice of the claim of Forgie or of that of the Sheriff and executing creditor may have to be tried—but only the questions of law are at present before the Court.

Was the interest of Wishart exigible, whether as "lands" or as "goods"?

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Had his position been that of a tenant at will simply and without more, there would be little, if any, doubt. "Every estate at will is at the will of both parties, landlord and tenant; so that either of them may determine his will, and quit his connection with the other at his own pleasure." Blackstone's Commentaries, book 2, p. 145; Co. Litt. 55 (a). It is of such a character "that the death of either party determines the will:" *James v. Dean* (1805), 11 Ves. 383, at p. 391, per Lord Eldon, C.; *Scobie v. Collins*, [1895] 1 Q.B. 375, at p. 377, per Vaughan Williams, J.; *Turner v. Barnes* (1862), 2 B. & S. 435, at p. 452, per Blackburn, J.; *Doe Stanway v. Rock* (1842), 1 Car. & M. 549; S.C., 6 Jur. 266, per Patteson J.; *Doe Kemp v. Garner* (1843), 1 U.C.R. 39—Robinson, C.J., giving the judgment of the Court. So, sale or lease by the landlord determines the tenancy: *Doe Davies v. Thomas* (1851), 6 Ex. 854; *Jarman v. Hale*, [1899] 1 Q.B. 994; *Dinsdale v. Iles* (1674), 2 Lev. 88; *Hogan v. Hand* (1861), 14 Moo. P.C. 310. And sale or assignment by the tenant has the same effect: Co. Litt. 57 (a); although notice must be given to the landlord before he will be bound; *Pinhorn v. Souster* (1853) 8 Ex. 763, at pp. 772, 773, per Parke, B., giving the judgment of the Court; *Carpenter v. Colins* (1606), Yelv. 73. Neither landlord (*Doe Kemp v. Garner*) nor tenant (*James v. Dean*) could bequeath such a tenancy; nor can the tenant assign to any other: Blackstone's Commentaries, book 2, p. 145. While leaseholds are exigible at the common law as chattels, no instance has been cited, and I can find none, in which it was held that a tenancy at will was such a leasehold.

It does not seem to have been the subject of any English or Ontario decision; and, consequently, there is no express authority.

It is said in 17 Cyc. 954: "The better rule seems to be that the interest which a tenant at will . . . has in another's real estate is not such an interest in land as can be sold on execution." Of the cases cited in support of this, *Bigelow v. Finch* (1851), 11 Barb. (N.Y.) 498, S.C. (1853), 17 Barb. (N.Y.) 394, *Colvin v. Baker* (1848), 2 Barb. (N.Y.) 296, are upon a statute which says in so many words "estates at will or by sufferance shall be chattel interests, but shall not be liable as such to sale on execution." See R.S. N.Y. 1852, part II., ch. 1, art. 1, sec. 5. *Waggoner v. Speck* (1827), 3 Ohio (not Ohio State) 293, is not in point. *Wildy v.*



*Doe ex dem. Bonney* (1853), 26 Miss. 35, however, does decide that the interest of "a tenant at sufferance . . . is not capable of transfer or transmission: 4 Kent 117. The Sheriff's deed could convey no more than"—the tenant's "own deed could, which . . . could convey nothing."

Freeman on Executions, 3rd ed., sec. 119, p. 495: "It is undoubtedly true, as a legal proposition, that a defendant having no estate in property which he can transfer has none which is subject to execution for the judgment, the levy, and the sale under execution ordinarily accomplished no other purpose than might have been realised by a transfer made by the defendant." Accordingly, where the hiring, etc., amounts to a mere personal right or license, this is not exigible: *Reinmiller v. Skidmore* (1872), 7 Lans. 161; *Williams v. McGrade* (1868), 13 Minn. 174; *Kile v. Giebner* (1886), 114 Pa. St. 381.

The same author (sec. 177) says: "Copyhold estates, and all other tenancies at will or by sufferance, are not subject to execution." No authorities are quoted except those found in 17 Cyc., and already considered. The author proceeds: "The reason of this rule is apparent. An occupant by the permission and at the will of the owner has no estate which he can transfer by a voluntary conveyance, and no possession which can be regarded as independent of or adverse to that of the owner. Hence he has no interest in the title, nor in the possession, susceptible of transfer by execution."

It seems in the only case in England which I can find at all bearing on the matter to have been taken for granted that such an estate could not be taken in execution.

In *Doe Westmoreland v. Smith* (1827), 1 Man. & Ry. 137, the defendant had entered upon land under an agreement for a lease, and had thereafter paid rent to the landlord agreeably to the terms of the intended lease. The Sheriff, under a *fi. fa.*, sold the interest of the defendant to the lessors of the plaintiff. The seizure, of course, did not vest the term in the Sheriff, but it remained in the debtor until actual assignment: *Playfair v. Musgrove* (1845), 14 M. & W. 239; and the Sheriff could not put the purchaser into possession: *Taylor v. Cole* (1789), 3 T.R. 292; *Rex v. Dean* (1680), 2 Show. 85; *Playfair v. Musgrove*, 14 M. & W. 239: and so he had to bring his action in ejectment: *Doe*

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*Batten v. Murless* (1817), 6 M. & S. 110. Objection was taken by the defendant that there was not such a tenancy from year to year as could be seized by the Sheriff. It is quite plain that, if a tenancy at will might be seized, the defendant's case was hopeless—and his counsel in term argued that the holding was a tenancy at will. This, however, was not acceded to by the Court. That the difference between a tenancy from year to year and a tenancy at will is considered the crux of this case is seen by the reference by the reporters to two cases, *Mann v. Lovejoy* (1826), 1 Ry. & Moo. 355, and *Hamerton v. Stead* (1824), 3 B. & C. 478, in both of which the question was "tenancy from year to year or tenancy at will?" and in the latter of which, at p. 483, Littledale, J., says: "Where parties enter under a mere agreement for a future lease they are tenants at will; and if rent is paid under the agreement, they become tenants from year to year".

When we consider that a Sheriff cannot seize what he cannot sell: Com. Dig., tit. Execution (C 4); *Legg v. Evans*, 6 M. & W. 36; *Universal Skirt Manufacturing Co. v. Gormley* (1908), 17 O.L.R. 114, at p. 136; I think it quite clear that, at the common law, a tenancy at will is not exigible.

And this particular interest has not been covered by legislation, none of the amendments applying to such a chattel interest. The history of the legislation is to be found in *Universal Skirt Manufacturing Co. v. Gormley*, 17 O.L.R. 114, at p. 136—the present Act is (1909) 9 Edw. VII. ch. 47.

Legislation extending the classes of property to which execution will attach is always construed strictly. See, for example, the judgment of Armour, C.J., in *Morton v. Cowan* (1894), 25 O.R. 529, at pp. 534, 535.

Nor could it be considered "land" within the meaning of the Execution Act. In addition to "land" proper, sec. 32 (1) makes exigible under a *fi. fa.* lands "Any estate, right, title or interest in land which, under section 8 of the Act respecting the Transfer of Real Property, may be conveyed or assigned by any person, or over which he has any disposing power which he may, without the assent of any other person, exercise for his own benefit . . ." The section 8 referred to, *i.e.*, that of R.S.O. 1897, ch. 119, reads: "A contingent, an executory, and a future interest, and a possibility coupled with an interest in land . . . also a right of

entry . . . may be disposed of by deed. . . .” A mere tenant at will has none of these.

It is argued, however, that the position of a holder of a certificate of location is different from that of a mere tenant at will, and that his interest is exigible.

In *Reilly v. Doucette*, 2 O.W.N. 1053, the matter came up for decision; and, while the report does not contain any reference to this point, I am informed by my learned brother that he held that a *fi. fa.* could not attach to this kind of property. To give effect to the argument of the appellants it would be necessary to reverse this judgment. I do not think that should be done.

In my view, the appeal can be disposed of on the short ground that no transfer by the Sheriff could be effective (sec. 73), as he could not be “the recorded holder of the claim.” Not being able to transfer effectively, he could not sell; and, as we have said, he cannot seize what he cannot sell.

But there are other and valid reasons for this view.

Is this a chattel interest exigible under a *fi. fa.* goods? The argument is, that sec. 65 makes the mining claim free from liability to impeachment or forfeiture except as expressly provided by the Act; and that, consequently, there is a term not liable to be put an end to by the Crown.

But the forfeiture is such a forfeiture as is contemplated by secs. 84, 85, 86, 190, 191, by reason of loss of the status of licensee, or doing or leaving undone something. If the provisions of sec. 65 are inconsistent with those of sec. 68, they must give way, the later section speaking “the last intention of the makers:” *Attorney-General v. Chelsea Waterworks Co.* (1731), Fitzg. 195; *Wood v. Riley* (1867), L.R. 3 C.P. 26; Maxwell on the Interpretation of Statutes, 3rd ed., p. 215; and “*leges posteriores, priores contrarias abrogant*” (1614), 11 Co. R. 62b; *Garnett v. Bradley* (1878), 3 App. Cas. 944, at p. 965.

There is, however, in my mind, no inconsistency—no necessary repugnancy. The intention of the Act is to leave the paramount power of dealing with the land in the Crown until the issue of the patent, and consequently makes the certificate-holder a tenant at will. So long as the Crown does not exercise its paramount power, the certificate-holder is not liable to have his position attacked. So, too, while he has the right to work the mine, this

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right is subject to the same limitation—and I see nothing in this inconsistent with a tenancy at will, any more than the right to crop a farm held on the same tenancy. No doubt, the minerals got out become the personal property of the exploiter, and so subject to a *fi. fa.* goods, but the same cannot be said of a right to get such minerals, which right may be terminated at any moment by the lord paramount.

Nor is there any necessary inconsistency in the right given to transfer an interest to another. That, at the very most, would make the transferee but a tenant at will in lieu of the original licensee—this is not such a transfer as is covered by R.S.O. 1897, ch. 119, sec. 8.

It is argued, however, that this is an instance of *profits à prendre*; and it is argued that a *fi. fa.* lands will attach. For this is cited *McLeod v. Lawson*, 8 O.W.R. 213, at p. 220, where it is said that the highest Lawson's right could be put at was a *profit à prendre*. There certain persons had a mining lease which by the statute was to be for a term of ten years (R.S.O. 1897, ch. 36, sec. 35); and from one of them Lawson received the privilege of entering upon the location and mining ore and mineral and removing the same from the date of the agreement up to the 31st August, 1905. See 7 O.W.R. at p. 521, 8 O.W.R. at p. 221.

It is then urged that a *profit à prendre* is decided to be exigible by *Canadian Railway Accident Co. v. Williams*, 21 O.L.R. 472, a case of an oil lease like that in question in *McIntosh v. Leckie*, 13 O.L.R. 54. But in that case there were leases for a certain fixed time, and it was on such leases that the decision of the Chief Justice of the Common Pleas was given. That is no authority for saying that a *profit à prendre* at the will of the Crown (so to speak) is likewise exigible.

A strong argument for the conclusion I have arrived at is the recent statute, 2 Geo. V. ch. 8, sec. 7, which provides that a certified copy of a writ of execution may be filed with the Recorder, and the Recorder shall enter a note of the execution, "and from and after, but not before, such entry, the execution shall bind all the right or interest of the execution debtor in the claim, and after such entry the Sheriff shall have power to sell and realise upon such right and interest in the same way as goods and chattels may be sold . . ." In this statute there is to be noted: (1) that



it is by the entry and not before that the execution binds the debtor's interest; it has no power or effect in itself; before this statute no entry could be made; (2) after the entry, the Sheriff may sell in the same way as goods and chattels, not *other* good and chattels.

A third point is not without interest; the sale by the Sheriff may be to one who is not a licensee, which cannot be done by the debtor himself: sec. 35 of the Mining Act.

I am of opinion that the appeal should be dismissed with costs.

I should add that, while all the many cases referred to by counsel in their very careful and exhaustive arguments (and in a memorandum sent in) are not cited in this judgment, I have read them all and many more.

FALCONBRIDGE, C.J., and BRITTON, J., agreed in the result.

*Appeal dismissed with costs.*

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[IN THE COURT OF APPEAL.]

KING v. NORTHERN NAVIGATION Co.

*Negligence—Death of Person Falling into Hold of Vessel—Master and Servant—Termination of Relation—Licensee—Duty of Owner of Premises.*

The judgment of a Divisional Court, 24 O.L.R. 643, dismissing the action, was affirmed.

*Held, per GARROW, J.A.,* that the plaintiff's deceased husband was not, when he met his death, upon the defendants' steamer in the course of his employment; and, so far as the action was based upon the relation of master and servant, it failed. He was not there as an invitee, nor in any higher position than that of a bare licensee; and the only duty which the defendants owed him was not to deceive him by means of a trap, or to be guilty of any act of active negligence, of which on the occasion in question there was no reasonable evidence; the licensee must otherwise take the premises as he finds them.

*Per MEREDITH, J.A.,* that the deceased was a trespasser; and, in any view, the plaintiff had not proved a good cause of action against the defendants.

APPEAL by the plaintiff from the judgment of a Divisional Court, 24 O.L.R. 643.

April 19 and 22. The appeal was heard by Moss, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, J.J.A.

A. Weir, for the plaintiff.

R. J. Towers, for the defendants.

(See the report of the argument in 24 O.L.R. at pp. 644, 645.)

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June 28. GARROW, J.A.:—Appeal by the plaintiff from the judgment of a Divisional Court, reversing the judgment, in favour of the plaintiff, at the trial, before Clute, J., and a jury.

The action was brought under the provisions of the Fatal Accidents Act, by the plaintiff, on behalf of herself and her infant children, to recover damages caused by the death of her late husband, William King, on the 6th March, 1911, under circumstances of alleged negligence on the part of the defendants.

The deceased had been in the employment of the defendants as chief engineer on the steamship "Ionic" during the sailing season of 1910. The ship was laid up for the winter, with other ships of the defendants, at the port of Sarnia; and it was, it is said, in an attempt to go on board that the deceased lost his life, by falling down an open hatchway on the ship "Huronie."

The statement of claim alleges that the deceased was, in his lifetime and at the time of his death, employed by the defendants as chief engineer of the steamboat "Ionic," and that, on the 6th March, he had occasion, on the business of the defendants, in their employ and for their benefit, to go to the steamboat "Ionic," and in order to do so had to cross the "Saronic" and the "Huronie;" that he went, as aforesaid, with the leave and license of the defendants and upon their invitation; that he went to the "Ionic" properly and lawfully, upon business which entitled him to go and be upon the "Ionic;" that the defendants had, in pursuance of a system which was defective and grossly negligent, left a hatchway open and unguarded on the main deck of the "Huronie," upon the route which persons going from the dock to the steamboat "Ionic" would naturally take, thereby placing a dangerous trap in the pathway across the "Huronie," which was only dimly lighted, and the main deck of the "Huronie" had been recently oiled; and that the open and unguarded hatchway was a defect in the condition or arrangement of the ways, plant, or premises connected with or intended to be used in the business of the defendants, and the leaving it open and unguarded constituted negligence on the part of the defendants' employees who had superintendence intrusted to them, while in the exercise of such superintendence, within the meaning of the Workmen's Compensation for Injuries Act.

It is not very easy from this kind of pleading quite to understand or arrive at the exact ground upon which the plaintiff intends to rely, since practically every ground at common law or under the statute is apparently invoked. The deceased is said to have been an employee, also an invitee and a licensee and the victim of a system. But, if there is mystery in the pleading, there is really none in the facts, which, in their essential features, are absolutely simple and uncontradicted. And, at the risk of repeating in my own way what is already very fully reported of the case in the Divisional Court, in 24 O.L.R. 643, I propose as briefly as possible to restate them here.

The deceased had been in the employment of the defendants during the previous season, and had been engaged for the following season, to begin on the 1st April. On the 12th December, Mr. Gildersleeve, the defendants' manager, sent him the following letter, upon which much stress was laid at the trial:—

“Northern Navigation Company Limited.

“H. H. Gildersleeve, Manager.

Manager's Office.

“Sarnia, Canada, Dec. 12th, 1910.

“To the Engineers of the Steamers Hamonic, Huronic, Saronic and Ionic.

“Outfitting of Steamers.

“Dear Sir:—

“You will please take notice that it is the intention of the company this year to outfit the engine on your steamer as soon as the vessels are laid up.

“With the close of your contract for this year, you will be allowed regular wages until such time as your boat is outfitted.

“It will be necessary for you to practise the strictest economy, and no supplies are to be purchased nor are you to take any of your machinery to a shop without an order from the company's chief engineer, Mr. Samuel Brisbin, who will have charge of all the steamers at this port.

“Yours truly,

“H. H. Gildersleeve,

“Manager.”

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Mr. Brisbin named in the letter is, in summer, chief engineer of the steamboat "Huronie," but, in winter, has general superintendence over all the defendants' ships at Sarnia.

There is no evidence that the deceased replied to the letter. About New Year's, he saw Mr. Brisbin, who asked him if he wanted to come back, and he said he did—that is, for the following season. Mr. Brisbin then told him "to lay the boat up and then start to fit her out at the same rate of pay per day as you are getting per month." The deceased, accordingly, after laying the boat up, commenced the work of fitting out, and continued at it until the 17th February following, when Mr. Brisbin again spoke to him and said: "I think you are about done now. . . . You will start on the 1st April again to fit out—to do the rest of the work." The deceased, accordingly, quitted work and was entirely idle from then until his death, on the 6th March. He had working with him, in the work of fitting, the second engineer, Mr. Duff, an oiler, and one or two firemen, over whom he had oversight. All these quitted work by his direction at the same time as he did, and the second engineer was told by the deceased to return on the 1st April to resume work. There is no evidence of any direction or communication of any kind between the deceased and the defendants or any one on their behalf after the 17th February. Some time before that date, the new agreement for the season of 1911 was entered into between the deceased and the defendants, the service to begin on the 1st April following. When he quitted work on the 17th February, he left his tools on the ship, in the engineer's room which he had occupied during the previous season, of which he carried a key. On the morning of his death, he asked his wife, the plaintiff, for a little tin in which to bring back from the boat a little white lead wanted for painting purposes at his house, which he was to ask "Mike" for, and said to her, either then or a day or two earlier, that he was going to the boat to see how the boiler-makers were getting on. This was the last thing actually known of him until his dead body was found in the hold of the "Huronie" the next day, although a sailor said he saw him in the street apparently going towards where the boats were.

The gangway across the "Huronie" to the "Ionic" was



opened for the first time on the morning of the 6th March, to enable lumber to be carried in to the "Ionic" for the purpose of repairs then being made. When the deceased had last been there, there was no such access through the "Huronie." There was some, but not perfect, light along the gangway on the "Huronie," and it, when opened, formed the most direct and convenient mode of access to the "Ionic." The hatchway had been opened for purposes of necessary ventilation. It lay in the line of the gangway across the "Huronie," and a person using the gangway would be very apt, if not observing it, to fall into it.

There was evidence that on the 6th March there were carpenters and other workmen engaged at work upon the "Ionic," but there was no evidence that the deceased had any charge or superintendence over them or any of them, or that in going upon or towards the boat on the occasion in question he did so at the request, express or implied, of the defendants or in the discharge of any duty which he owed to the defendants, or that such act was otherwise than wholly voluntary on his part.

At the trial Clute, J., appeared to be of the opinion that there was some discrepancy, to be solved by the jury, between Mr. Gildersleeve's letter, obviously only a circular letter, addressed not to the deceased alone, and the subsequent somewhat limiting orders and directions given by Mr. Brisbin. I am, with deference, quite unable to adopt that view. It is, I think, quite immaterial to determine whether or not the deceased's employment at the work of fitting was, as the letter says, to be until that work was completed, for at the utmost it was quite open to the defendant to direct a suspension of the work at any time. The real engagement clearly was that subsequently made with Mr. Brisbin, under which the deceased went to work, was paid, and also, quite willingly apparently, quitted work as directed.

The law, both at common law and under the statute, has wisely surrounded the servant with certain safeguards for his safety and protection. He may, for instance, claim a safe place to work in, safe tools, materials, and appliances with which to carry on his master's operations, care in the selection of com-

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petent overseers and foremen, etc.; but all these only when and so far as may be necessary for his protection while actually working. It is for the master to say when he shall work. And, if the master provides no work, but continues to pay, the servant cannot complain. All he need do is to be ready and willing when called on. When the servant is not engaged in work for the master, he has no more right to complain of the defective conditions of his master's premises than has any other stranger.

It is clear, therefore, upon the admitted facts, that, in so far as the action is based upon the relation of master and servant, it utterly fails.

The Divisional Court was apparently of the opinion that the deceased was, under the circumstances, in the position of a trespasser. I do not, with deference, consider it necessary to go quite so far. My inclination, rather, is to regard the unfortunate man, upon the evidence, as in the position of a bare licensee, although the result, so far as the action is concerned, would not, I think, in law be different. His past and future employment on the boat, the key which he carried, and all the other circumstances might not unreasonably lead him at least to think that he was at liberty to go upon the boat upon the occasion in question without the special leave of the owners. This, however, would not place him in the position of an invitee, or, indeed, in any higher position than the one which I have indicated. And the only duty which an owner of premises owes to such a person is not to deceive him by means of a trap, or to be guilty of any act of active negligence, of which on the occasion in question there is no reasonable evidence. See *Perdue v. Canadian Pacific R.W. Co.* (1910), 1 O.W.N. 665. The licensee must otherwise take the premises as he finds them.

The plaintiff's action, therefore, seems to me, upon the undisputed facts, wholly to fail.

I would, for these reasons, dismiss the appeal with costs.

MEREDITH, J.A.:—I am unable to say that the Divisional Court was wrong in holding that the plaintiff's husband was, at the time of his death, a trespasser upon the defendants' vessel—the "Huronic." The onus of proof of his right to be upon that vessel, at that time, rested upon the plaintiff; and I am unable to

say that she has satisfactorily proved any such right. It is quite plain that he was not there for the purpose of performing any services under the terms of any employment by the defendants. Such services had some time before ended; and were not to be renewed until nearly a month later. It is quite plain, too, that one purpose of his going to the vessel was to procure some paint for his own use; the "tin" in which it was to be brought back was taken by him when he set out from his own house, and was found near his body after the accident. It may be, and indeed it is very likely, that, had he asked leave to take the paint from the vessel, it would have been granted: but there is no evidence of any such request made or intended to be made. So, too, if he had desired to go for the purpose of merely seeing how things were going on on the vessel, no doubt consent would have been given, but only at his own risk; if the risk were sought to be put on the defendants, leave would not be given. And so I am unable to say that the Divisional Court erred in any respect in its conclusions.

But in any case, in any circumstances reasonably imaginable upon the evidence adduced at the trial, I am unable to consider that the plaintiff has proved any good cause of action against the defendants.

The unfortunate man fell through a hatchway of the vessel "Huronie:" the hatchway was covered with planks set in it; but two of these planks had been turned up on edge for the purpose of ventilation; and this was proved to be a thing necessary for the proper care and preservation of the vessel when laid up, as the "Huronie" was, for the winter. There was, therefore, nothing wrong in having that opening in the hatchway; an opening which was protected to the height of the width of the planks so set, and firmly held in place, on edge.

But it is said that the hatchway was, at the time, provided by the defendants as a way for the deceased, and others, to go to the defendants' vessel the "Ionic;" and, with the opening made by the upturned planks, and the obstruction which the planks so placed caused, was, in the dim light, a dangerous way; and so they are answerable in damages to the plaintiff by reason of the death of her husband, caused, without fault on his part,

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by such dangerous obstruction and opening in a place insufficiently lighted to make the danger plain.

But I am unable to find any evidence of any kind of invitation, to the deceased, to make use of the hatchway as a way across the "Huronie" to the "Ionic," or as a way for any purpose. The mere opening of some of the ways into the vessels for the purpose of permitting some work, with which the deceased was in no way connected, to be done, was no sort of invitation to him; and he was a man quite familiar with the vessels and their construction, and indeed with all things connected with them.

It is also quite evident that the planks on edge were not the cause of the deceased stumbling: he apparently stumbled and fell forward at the raised edge of the hatchway, some little distance away; and then, coming in contact with the upturned planks, in some extraordinary manner went over one of them and down between them; a thing which no one would have anticipated.

The case seems to me to have been one of a pure accident, for which no one can fairly be blamed; and certainly not one for which the defendants can be held to be liable in damages to the plaintiff.

I would dismiss the appeal.

MOSS, C.J.O., MACLAREN and MAGEE, J.J.A., agreed in dismissing the appeal.

*Appeal dismissed with costs.*

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## [DIVISIONAL COURT.]

## PEARSON v. ADAMS.

*Deed—Conveyance of Land—Building Restriction—Construction—Covenant or Condition—Enforcement by Owner of other Land afterwards Conveyed by same Vendor—"Detached Dwelling-house"—Apartment House—Injunction.*

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The defendant, being the owner of lot 32 upon a certain avenue in a city, proposed to erect thereon a six-suite apartment house. In the deed of lot 32 by the executors of the original owner who laid out the avenue, to the defendant's predecessor in title, the following words followed the description of the lot—"to be used only as a site for a detached brick or stone dwelling-house, to cost at least two thousand dollars, to be of fair architectural appearance, and to be built at the same distance from the street line as the houses on the adjoining lots." The deed also contained the ordinary covenants and a special covenant by the grantee not to erect or maintain upon the land any building for manufacturing purposes, etc.:—

*Held*, that the provision above quoted was a covenant, notwithstanding its form, and notwithstanding the expressing of another prohibition in the regular form of a covenant. The maxim *expressio unius est exclusio alterius* did not apply.

*Held*, also, that the plaintiff, who bought other land upon the same avenue from the owners, after the deed under which the defendant claimed, could take advantage of the covenant.

*Rogers v. Hosegood*, [1900] 2 Ch. 388, and *Formby v. Barker*, [1903] 2 Ch. 539, followed.

*Held*, also (BRITTON, J., dissenting), that the apartment house which the defendant proposed to erect was not "a detached dwelling-house," within the meaning of the covenant; and the defendant should be enjoined from erecting it.

*Re Robertson and Defoe* (1911), 25 O.L.R. 286, discussed and distinguished.

Judgment of MIDDLETON, J., reversed.

MOTION by the plaintiff for an injunction restraining the defendant from erecting an apartment house upon certain lands on Maynard avenue, in the city of Toronto, in alleged breach of the provisions of a conveyance of the 18th April, 1888, which stipulated that the lands were "to be used only as a site for a detached brick or stone dwelling-house."

By consent of counsel the motion was turned into a motion for judgment.

May 1. The motion was heard by MIDDLETON, J., in the Weekly Court at Toronto.

*J. H. Coöke*, for the plaintiff.

*J. M. Godfrey*, for the defendant.

May 3. MIDDLETON, J.:—Apart from authority, binding upon me, I would have thought that an apartment house such as

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the defendant contemplates erecting could not be described as "a detached dwelling-house." I would have thought it clear that the building was in truth a series of separate dwellings, *attached*, and separated by the one main perpendicular wall and the two horizontal partitions. But this, as I understand the case of *Re Robertson and Defoe* (1911) 25 O.L.R. 286, is not the law here; and, yielding to the authority of that case, there is no alternative save to dismiss the action with costs. I do not think I should attempt to refine away that decision by making distinctions without any difference.

I think it better to adopt this course, and leave it to the plaintiff to take the case to a higher Court, rather than to adopt the alternative course of investigating the matter with such thoroughness as to enable me to say that I deem the decision referred to to be wrong. See sec. 81 of the Judicature Act. This relieves me from considering the other matters argued by the defendant's counsel.

The attention of the parties is drawn to the very recent decision in *Campbell v. Bainbridge*, [1911] 2 Scots L.T.R. 373.

The plaintiff appealed from the judgment of MIDDLETON, J.

June 10. The appeal was heard by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.

*J. H. Cooke*, for the plaintiff. This case, I submit, is distinguishable from *Re Robertson and Defoe*, 25 O.L.R. 286, by which Middleton, J., considered himself bound. The fact that the erection of a "three-suite dwelling-house" in that case may not have been a breach of the covenant there, does not make the erection of the building which is proposed here permissible under the stipulation in this deed. The stipulation or condition here is an implied covenant. To ascertain the scope of covenants, regard must be had to the object which they were intended to accomplish. In this case there was a general building scheme, and the intention was to build up Maynard place with a high class of private dwelling-houses: *Mackenzie v. Childers* (1889), 59 L.J. Ch. 188; *Dart's Vendors and Purchasers*, 7th ed., vol. 1, p. 579. It may be argued that there would be here an infringement of the rule against perpetuities. But I contended there would not. See *Mackenzie v. Childers*, *supra*, and *Coles v. Sims* (1854), 23

L.J. Ch. 258. As to the building itself, I submit that it is not "a detached dwelling-house" in the ordinary acceptation of the term: *Rogers v. Hosegood*, [1900] 2 Ch. 388; *Ilford Park Estates Limited v. Jacobs*, [1903] 2 Ch. 522.

*J. M. Godfrey*, for the defendant. The stipulation here is a condition, not a covenant, and so can only be enforced by the original grantor. It is not even an implied covenant: *Am. & Eng. Encyc. of Law*, 2nd ed., vol. 6, p. 501; *Rawson v. Inhabitants of School District No. 5. in Uxbridge* (1863), 89 Mass. (7 Allen) 125; *Duke of Norfolk's Case* (1553), 2 Dyer 138 b; *Shep. Touch.*, 133. The Massachusetts case is very much in point. As to the assumption of the right to sue, see *Clark v. City of Vancouver* (1903), 10 B.C.R. 31, which shews that after the conveyance there is no estate left in the grantor, but only a possibility of reverter, which is not assignable, and so no action lies. I also urge that there would be here a breach of the rule against perpetuities: *London and South Western R.W. Co. v. Gomm* (1882), 20 Ch. D. 562. On the main point, the erection of the proposed building would not be a breach. The building is a detached dwelling-house. One family could occupy the whole. I rely on *Re Robertson and Defoe*. See also *Campbell v. Bainbridge*, [1911] 2 Scots L.T.R. 373.

*Cooke*, in reply. As to the right to sue, see *Renals v. Cowlishaw* (1879), 48 L.J. Ch. 33, 830.

August 27. RIDDELL, J.:—The plaintiff, an architect, purchased one of the few vacant lots on Maynard avenue—he knew that there were building restrictions as to the class of building to be erected upon that street, and knew by personal inspection that the houses then on the street were private dwelling-houses and worth between \$7,000 and \$10,000 each. He himself built a house costing him about \$14,000, which he would not have done had he not believed that there were building restrictions sufficient to prevent the erection of such a building as is proposed by the defendant.

In 1888, Miss Maynard and Mrs. Atkinson, the executrices and devisees of the previous owner of the land (who had laid out Maynard avenue), sold a lot (No. 32) on this avenue to one Williamson, through whom the defendant claims, the husband of Mrs. Atkinson joining as grantor. The deed (which is numbered 4033)

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reads: "All and singular" (describing the land) "to be used only as a site for a detached brick or stone dwelling-house, to cost at least two thousand dollars, to be of fair architectural appearance, and to be built at the same distance from the street line as the houses on the adjoining lots. To have and to hold," etc. After the usual covenants, the following covenant by the purchaser is found: "And the said party of the second part hereby, for himself, his heirs, executors, administrators, and assigns, covenants, promises, and agrees to and with the said parties of the first part, their heirs and assigns, that he, the said party of the second part, his heirs and assigns, or any person or persons claiming or deriving title or interest in the lands hereby conveyed or any part thereof, through, under, or in trust for him, shall not nor will at any time or times hereafter erect or maintain or suffer or allow to be erected or maintained upon said lands or any part thereof any building for manufacturing purposes nor carry on or permit to be carried on on said lands or any part thereof any dangerous or noisy or offensive trade or business which would be a nuisance in the neighbourhood."

Miss Maynard swears that it was always her father's intention that Maynard avenue should be built up with a uniformly fine class of private detached dwelling-houses, and she had endeavoured to sell and convey the lands still unsold at his death in such a way as to carry out his wishes—and it was with a view that there should be erected on lot 32 a private detached dwelling-house, which would be in keeping with the houses on the other and adjoining lots, that the condition already recited was put in the deed.

The defendant purposes to erect an apartment house, a six-suite apartment house, upon lot 32. The plaintiff, having taken an assignment from Miss Maynard of "all and any right as grantor in the said conveyance (*i.e.*, that to Williamson) to enforce the conditions imposed under the said conveyance," brings his action "for an injunction restraining the defendant from erecting an apartment house on lot number 32, plan 454 . . . and thereby violating the conditions and restrictions contained in deed . . . number 4033."

A motion for an interim injunction was, by consent, turned



into a motion for judgment by Mr. Justice Middleton, and he dismissed the action with costs.

The plaintiff now appeals.

My learned brother thought that he was bound, on the authority of *Re Robertson and Defoe*, 25 O.L.R. 286, to hold that an apartment house such as the defendant intended to build is a "detached dwelling-house."

With much respect, I do not think so; I think that the learned Judge was, notwithstanding *Re Robertson and Defoe*, to follow his own opinion—and hold, as he would have held in the absence of authority which he considered binding upon him, "that an apartment house such as the defendant contemplated erecting could not be described as 'a detached dwelling-house'". In *Re Robertson and Defoe* there was a covenant that every residence erected on the land should be a detached house—the question (or one of the questions) was, was the erection of a "three-suite dwelling-house" a breach of this covenant? The learned Chief Justice of the Common Pleas held that it was not—but that is quite a different thing from saying that all apartment houses are "detached dwelling-houses." "In order to ascertain the scope and effect of . . . covenants . . . regard must be had to the object which they were designed to accomplish: *Ex p. Breull, In re Bowie* (1880), 16 Ch.D. 484; and the language used is to be read in 'an ordinary or popular and not in a legal and technical sense:' *per* Collins, L.J., *Rogers v. Hosegood*, [1900] 2 Ch. 388, 409:" *Robertson v. Defoe*, 25 O.L.R. at p. 288—that is what James, L.J., in *Hext v. Gill* (1872), L.R. 7 Ch. 699, at p. 719, calls the "vernacular".

In the particular case, the Chief Justice of the Common Pleas held that a certain apartment house was a detached house, and we are not called upon to consider whether his conclusion was what we should have arrived at. The learned Chief Justice does not, as I read the case, lay down any rule of law at all—if it be considered that the decision is such as to cover the present case, with much respect I should be unable to follow it. Within fairly wide limits, the question is not one of law at all but of fact.

Without at all saying that in some contracts, even in some statutes, under certain circumstances or in certain parts of the English-speaking world, an apartment house such as is con-

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templated might be called "a detached dwelling-house," I think it plain that it cannot be so called in Toronto and in this contract. No one using language here in its ordinary and popular vernacular sense would call an apartment house "a detached dwelling-house."

It is, to my mind, of none effect to say that a family, if large enough, might occupy the whole building—that might be said of the King Edward Hotel—or to say that there is just the one front door, etc.—that might be said of the Alexandra or the St. George Mansions. No one would, I think, call this apartment house even a dwelling-house, except one who desired to build an apartment house where only a dwelling-house should be—or his architect or some one making an affidavit for him. And neither defendant, architect, nor neighbour here ventures to call the proposed building "a detached dwelling-house."

The next question is—Is the provision in question a covenant? It is either a condition or a covenant—it is not simply a mere nullity.

I do not know of any case in which the law is more clearly, concisely, and accurately laid down than *Rawson v. Inhabitants of School District No. 5 in Uxbridge* (1863), 89 Mass. (7 Allen) 125. Bigelow, C.J., delivering the judgment of the Court, says (p. 127): "A deed will not be construed to create an estate on condition, unless language is used which, according to the rules of law, *ex proprio vigore*, imports a condition, or the intent of the grantor to make a conditional sale is otherwise clearly and unequivocally indicated. Conditions subsequent are not favoured in law. If it be doubtful whether a clause in a deed be a covenant or a condition, courts of law will always incline against the latter construction . . . Co. Litt. 205*b*, 219*b*; 4 Kent Comm. (6th ed.) 129, 132; Shep. Touch., 133; *Merrifield v. Cobleigh* (1849), 4 Cush. 178, 184. . . . The usual and proper technical words by which such an estate is granted by deed are 'provided', 'so as' or 'on condition'. Lord Coke says, 'Words of condition are *sub conditione, ita quod, proviso*'. *Mary Portington's case* (1614), 10 Co. 42*a*; Co. Litt. 203*a*, 203*b*. . . . In grants from the Crown and in devises, a conditional estate may be created by the use of words which declare that it is given or devised for a certain purpose, or with a particular intention. . . . But this rule is applicable only to those grants or gifts which are purely

voluntary, and where there is no other consideration moving the grantor or donor besides the purpose for which the estate is declared to be created. But such words do not make a condition when used in deeds of private persons. If one makes a feoffment in fee, *ea intentione, ad effectum, ad propositum*, and the like, the estate is not conditional, but absolute, notwithstanding. Co. Litt. 204*a*; Shep. Touch., 123, Dyer, 138*b*. . . . Ordinarily the . . . nonfulfilment of the purpose for which a conveyance by deed is made, will not of itself defeat an estate. . . . We believe there is no authoritative sanction for the doctrine that a deed is to be construed as a grant on a condition subsequent solely for the reason that it contains a clause declaring the purpose for which it is intended the granted premises shall be used, where such purpose will not enure specially to the benefit of the grantor and his assigns. . . . If it be asked whether the law will give any force to the words in a deed which declare that the grant is made for a specific purpose or to accomplish a particular object, the answer is, that they may, if properly expressed, create a confidence or trust, or amount to a covenant or agreement on the part of the grantee. . . . Conditions subsequent are not to be favoured or raised by inference or implication." *Duke of Norfolk's Case* (Hil. Term, 3 & 4 Ph. & M.), 2 Dyer 138*b*: "It seems *ea inentione* do not make a condition, but a confidence and trust . . . : " *per* Saunders and Stamford, Justices of B.R., p. 139 (a).

"No particular form of words is necessary to create a covenant. It is sufficient if, from the construction of the whole deed, it appears that the party means to bind himself:" Elphinstone on the Interpretation of Deeds, p. 409, rule 151. "Wherever the intent of the parties can be collected out of a deed for the not doing or doing a thing, covenant will lie:" *per* Nottingham, C., *Hill v. Carr* (1676), 1 Ca. Ch. 294; *S.C.*, sub nom. *Holles v. Carr*, 2 Mod 86, 3 Swans. 638. Lindley, J., points out in *Brookes v. Drysdale* (1877), 3 C.P.D. 52, at p. 60, that a covenant may be "in the form of a condition, a proviso, or a stipulation." And Parke, B., says in *Great Northern R.W. Co. v. Harrison* (1852), 12 C.B. 576, at p. 609: "No particular form of words is necessary to form a covenant: but, wherever the Court can collect from the instrument an engagement on the one side to do or not to do something, it

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amounts to a covenant, whether it is in the recital or in any other part of the instrument."

To my mind, there can be no doubt, taking the deed as it stands, that the words employed enable the Court to collect that the vendee was engaging not to put up any building but "a detached dwelling-house;" and, if that is so, although the words are more like a condition, there is a covenant.

Nor does the well-known rule *expressio unius est exclusio alterius*, or, as it is otherwise stated, *expressum facit cessare tacitum*, prevent this from operating as a covenant.

This maxim "is not of universal application. It depends upon the intention of the parties as it can be discovered upon the face of the instrument or upon the transaction:" *Saunders v. Evans* (1861), 8 H.L.C. 721, at p. 729, *per* Lord Campbell. "The maxim '*Expressio unius exclusio alterius*' is one that certainly requires to be watched. Perhaps few so-called rules of interpretation have been more frequently misapplied and stretched beyond their due limits:" *Colquhoun v. Brooks* (1887), 19 Q.B.D. 400, at p. 406, *per* Wills, J.

"I agree with what is said . . . below by Wills, J., about this maxim. It is often a valuable servant, but a dangerous master to follow in the construction of statutes or documents. The *exclusio* is often the result of inadvertence or accident, and the maxim ought not to be applied, when its application, having regard to the subject-matter to which it is to be applied, leads to inconsistency or injustice:" *S.C.* (1888), in appeal, 21 Q.B.D. 52, at p. 65, *per* Lopes, L.J.

Finally, the maxim has never been applied to a case in which a covenant would have been held to be created by the words of which it is desired to exclude the effect, and then covenants in the usual and regular form have been superadded. A covenant in the form of a condition is just as much *expressum* as one in the regular form of a covenant: and the whole of a deed must be given effect to wherever possible.

That the plaintiff, who bought from the owners after the deed under which the defendant claims, can take advantage of this covenant, is decided by *Rogers v. Hosegood*, [1900] 2 Ch. 388; *Formby v. Barker*, [1903] 2 Ch. 539, at p. 551, and cases cited. This is not, indeed, contested, and I do not pursue the subject.



I am of opinion that the judgment below should be reversed, with costs of the motion and the appeal.

FALCONBRIDGE, C.J.:—I agree in the result.

BRITTON, J.:—The action was brought for an injunction restraining the defendant from erecting an apartment house on lot No. 32 on the east side of Maynard avenue, in Toronto. It is contended that such erection there is in violation of a condition and restriction contained in a deed of this property from the executrices and devisees under the last will and testament of the Reverend George Maynard, in his lifetime of the township of York, deceased, to John William Williamson. The plaintiff claims title under Williamson. The deed to Williamson was made on the 18th day of April, 1888; and, after the grant to Williamson, his heirs and assigns forever, of the land therein described—being the land now owned by the defendant—the words added, now invoked by the plaintiff as applicable to the present case, are these—“to be used only as a site for a detached brick or stone dwelling-house, to cost at least two thousand dollars, to be of fair architectural appearance, and to be built at the same distance from the street line as the houses on the adjoining lots.” The express covenants of the grantee in that conveyance are against the erection or maintenance on the land of any building for manufacturing, and against carrying on, or permitting to be carried on, any part of the land, any dangerous or noisy or offensive trade or business which would be a nuisance in the neighbourhood.

The defendant proposes to build an apartment house. He calls it a dwelling-house, and in a sense it will be, if erected, a dwelling-house. He desires to rent it to or for six families—and the house will be fitted up to accommodate six tenants, and it will be a dwelling-house for these tenants. The architectural design of the proposed house, its location, the material in its construction, are all unobjectionable. The objection is, simply, that it is to be an apartment house—and the Court is asked, upon reading the conveyance, and taking into consideration that the street was intended to be what is commonly known as a residential street, to say that this house is not “a detached dwelling-house,” within the meaning of the conveyance and the understanding of the parties, when in April, 1888, the conveyance was made. In

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1888, there were very few—comparatively—apartment houses in Toronto. Since then the number has increased, and they have increased in size and improved in finish and convenience. It is quite true that, even with the best architectural design, they are objected to in certain localities; and, when the objection is because of location out of line with other buildings on the street, or because of finish, such objection may be well-founded. That is not this case. This is the simple objection that an apartment house is not a detached dwelling-house. I am of opinion that an apartment house may be fairly called a dwelling-house—and in this case a detached dwelling-house. It appears to me that an apartment house, as an objectionable house, was not within the contemplation of either of the parties to the deed in question. No definition of “dwelling-house” was given by either of the parties. As to location, it was to be detached, and the same distance from the street as houses on adjacent lots. It was to cost not less than \$2,000. Nothing was said as to maximum of size or cost. It was to be of fair architectural appearance. We are now asked to limit its size and its capacity to accommodate dwellers therein. That would be making a new conveyance, with more restriction than the grantee agreed to and more than the grantors asked. “The presumption is in favour of freedom.”

The case of *Campbell v. Bainbridge* [1911] 2 Scots L.T.R. 373, seems to me expressly in point. In that case the prohibition was of “houses or buildings of any kind other than villas or dwelling-houses with offices and such enclosing walls as my said disponent may think proper to build,” and it was held that the building of tenements was not prohibited. The Lord President (p. 375) said: “A tenement of dwelling-houses is just a dwelling-house. It is a dwelling-house with more or less accommodation in it. I cannot think that, in ordinary parlance, a set of flats could not be called a dwelling-house—they are dwelling-houses.”

Having come to the conclusion as above, it is not necessary that I should discuss the other branch of the case, namely, that there was no covenant on the part of the grantee affecting the matter in question.

In my opinion, the appeal should be dismissed with costs.

*Appeal allowed; BRITTON, J., dissenting.*

## [IN THE COURT OF APPEAL.]

## NELLES v. HESSELTINE.

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March 20.

June 18.

*Supreme Court of Canada—Right of Appeal to, from Judgment of Court of Appeal—Action in Nature of Suit in Equity—Judgment not Final—Supreme Court Act, secs. 38 (c), 48 (e), 71—Leave to Appeal—Extension of Time—Special Circumstances.*

In this action, begun in 1906, the plaintiffs claimed specific performance of two agreements for the delivery of stock and bonds. The trial Judge decreed specific performance, and in default damages. On appeal to the Court of Appeal, this judgment was modified, but specific performance was decreed, by a judgment pronounced on the 21st April, 1908. The defendant company not delivering the stock or bonds, a reference for the assessment of damages was proceeded with, and a report made. The damages were reduced on appeal by a Judge of the High Court, and his order was affirmed by a judgment of the Court of Appeal, from which the defendant company appealed to the Supreme Court of Canada. The defendant company, in March, 1912, sought from the Court of Appeal leave to appeal to the Supreme Court of Canada from the judgment of the Court of Appeal of the 21st April, 1908:—

*Held*, that the company might have appealed as of right, and without leave, within the sixty days provided by sec. 69 of the Supreme Court Act, R.S.C. 1906, ch. 139, from the judgment of April, 1908, although it was not a final judgment, the action being in the nature of a suit in equity, within the meaning of sec. 38 (c) of the said Act; and, if leave were necessary, application might have been made either to the Supreme Court of Canada or to the Court of Appeal under sec. 48 (e); but, assuming that the Court of Appeal had power, under sec. 71, to extend the time and allow the appeal, the power should not be exercised, there being no "special circumstances" to justify it; MEREDITH, J.A., dissenting.

APPLICATION on behalf of the defendants the Windsor Essex and Lake Shore Rapid Railway Company for an order allowing, in terms of sec. 71\* of the Supreme Court Act, R.S.C. 1906, ch. 139, an appeal from a judgment pronounced by the Court of Appeal in this action on the 21st April, 1908.

March 16. The application was heard by Moss, C.J.O., in Chambers.

*M. Wilson*, K.C., and *A. H. F. Lefroy*, K.C., for the applicants.

*C. J. Holman*, K.C., for the plaintiffs.

March 20. Moss, C.J.O.:—Several other directions are asked for in the notice of the application, but it is quite apparent that the only motion which I can entertain is that made under sec. 71.

\* 71. Notwithstanding anything herein contained the Court proposed to be appealed from, or any Judge thereof, may, under special circumstances, allow an appeal, although the same is not brought within the time herein before prescribed in that behalf.

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The other matters could be dealt with only by the Supreme Court of Canada or a Judge of that Court.

I have read the numerous affidavits and other papers forming the material on which the motion is supported and opposed, including the opinion of the Registrar of the Supreme Court upon the motion heretofore made on behalf of the applicants to affirm the jurisdiction of the Supreme Court to entertain an appeal from the judgment in question, and of Mr. Justice Idington, speaking for the Supreme Court, in affirming the Registrar.

I am fully sensible of the unfortunate situation which the applicants seem to occupy at present, of not having ever had an opportunity afforded them of appealing from the judgment in question to the Supreme Court, owing to the form of the judgment and the view taken by the Supreme Court as to its jurisdiction to entertain an appeal in such a case. Upon the application to the Registrar of that Court to affirm jurisdiction, he expressly held that there was no jurisdiction because the appeal had not been brought within sixty days, and determined nothing as to the point of the judgment not being a final judgment. But it is impossible not to see from the reference to the cases of *Clarke v. Goodall* (1911), 44 S.C.R. 284, and *Crown Life Insurance Co. v. Skinner* (1911), 44 S.C.R. 616, what the opinion of the Court was on the point.

Besides, the chief ground upon which the applicants rest their present application and excuse their delay is, that the judgment, not being a final judgment, was not appealable to the Supreme Court upon or after its being pronounced by this Court. And, in view of the several decisions on the point, found in the Supreme Court reports, which I have again read and considered, it does not seem open to question that the judgment of the 21st April, 1908, falls within the prescribed category of non-final and therefore non-appealable judgments.

The result is, that, as I have said, the applicants have been placed in an unfortunate position, seemingly without any special fault on their part. On the other hand, the plaintiffs are equally blameless, and undoubtedly, upon the faith of the judgment, have incurred large expense in and about the conduct of a reference which, on the applicants' contention, was based on an erroneous view of their liability.



The difficulty, and, I think, an insuperable one, that I find in the way of relief upon this application is, that the case is not one to which sec. 71 applies, and that I am without power to do what is asked. That section only enables a Judge of the Court appealed from to allow an appeal under special circumstances, although it was not brought within the prescribed time, which, if this were an appealable case, would be within sixty days. The expression "allow an appeal" has been interpreted as meaning only that a Judge may settle the case and approve the security: *per* Strong, J., in *Vaughan v. Richardson* (1890), 17 S.C.R. 703. See also *News Printing Co. v. Macrae* (1896), 26 S.C.R. 695, at p. 701. But, as the context shews, the "appeal" to be allowed and the case to be settled and the security to be approved plainly refer to an appealable case, one that but for the lapse of time could have been appealed to the Supreme Court as of course, The single power given to the Court or Judge appealed from is to remove, in such a case, the difficulty occasioned by the failure to carry an appeal to the Supreme Court within the prescribed time. It confers power to grant leave to appeal in a non-appealable case, or for taking any other step in the matter.

I am unable, therefore, to see my way to making any order or to giving any direction as to security or otherwise, as asked.

The motion must be dismissed, and the plaintiffs are entitled to their costs.

The applicants appealed to the Court of Appeal from the order of Moss, C.J.O., and also made a substantive motion for the order which the learned Chief Justice had refused to make.

\*April 15. The appeal and motion were heard by Moss, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

A. H. F. *Lefroy*, K.C., for the applicants, stated that the substantive motion was made under sec. 38 of the Supreme Court Act, as well as sec. 71. He referred to *Lake Erie and Detroit River R.W. Co. v. Marsh* (1904), 35 S.C.R. 197, *per* Nesbitt, J., at p. 200, and to *Crown Life Insurance Co. v. Skinner*, 44 S.C.R. 616; and contended that the case at bar did not come within the

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\* The argument was the first heard in the new court-room of the Court of Appeal, at Osgoode Hall.

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grounds on which leave to appeal was refused in these cases. The applicants had been advised by their counsel that they could not appeal against the judgment of the 21st April, 1908, and should not suffer if a mistake had been made in that respect.

*C. J. Holman*, K.C., for the plaintiffs, argued that, the applicants having allowed four years to go by, and taken their chances on the result of the reference, should not now be allowed to appeal against the judgment of April, 1908. He referred to *News Printing Co. v. Macrae*, 26 S.C.R. 695.

*Lefroy*, in reply.

June 18. MACLAREN, J.A.:—The defendants the Windsor Essex and Lake Shore Rapid Railway Company have appealed to this Court from an order made in Chambers by the Chief Justice of the Court on the 20th March, 1912, dismissing their motion for an extension of the time for appealing to the Supreme Court from the judgment rendered herein by this Court on the 21st April, 1908, and for allowance of their appeal to the Supreme Court from the said judgment.

The motion made before the Chief Justice was based exclusively upon sec. 71 of the Supreme Court Act; and sec. 38 of the Act was not cited or referred to. On the motion before the full Court, counsel for the applicants stated that he desired to present his claim not only by way of appeal, but also as a substantive motion under sec. 38, as well as sec. 71, and he read in support of his motion affidavits that were made subsequent to the decision of the Chief Justice refusing the motion presented to him, chiefly as to the intention of the defendants to appeal.

The action was instituted in 1906, for the specific performance of two agreements whereby certain stock and bonds of the company were to be handed over to the plaintiffs. The trial Judge ordered specific performance, and in default damages. On appeal to this Court, the judgment was modified, but specific performance was decreed against the company on the 21st April, 1908: 11 O.W.R. 1062. There was no appeal from this judgment; and, the company not delivering the stock or bonds, there was a reference before the Master to assess the damages; and he made his report on the 7th April, 1909. The company appealed, and the appeal came before Meredith, C.J., who, on the 23rd January,

1911, gave judgment reducing the damages: 2 O.W.N. 643. The company further appealed to this Court, and on the 28th September, 1911, their appeal was dismissed: 3 O.W.N. 65.

From this last judgment an appeal was taken to the Supreme Court, which is still pending. The company moved in the Supreme Court to have an appeal from the judgment of this Court of the 21st April, 1908, included in their appeal to that Court. This motion came before the Registrar, who held that the Supreme Court had no jurisdiction to grant this or to extend the time for appealing; and an appeal from the Registrar was heard by the full Court and dismissed on the 23rd February, 1912: 21 O.W.R. 201.

As above stated, a motion was subsequently made before the Chief Justice of this Court, and afterwards before the full Court, to extend the time and to grant leave to appeal to the Supreme Court from the judgment of the 21st April, 1908.

In my opinion, the company might have appealed as of right from the last-named judgment within the sixty days provided by sec. 69 of the Supreme Court Act, although it is not a final judgment; and there is nothing to the contrary in the cases of *Union Bank of Halifax v. Dickie* (1908), 41 S.C.R. 13; *Wenger v. Lamont* (1909), 41 S.C.R. 603; *Clarke v. Goodall*, 44 S.C.R. 284; or *Crown Life Insurance Co. v. Skinner*, 44 S.C.R. 616; as these were all common law actions.

Section 38 (c) of the Supreme Court Act gives an appeal to that Court from any judgment, whether final or not, of the highest Court of final resort in any Province other than Quebec, where the Court of original jurisdiction is a Superior Court, in any action, suit, cause, matter, or judicial proceeding in the nature of a suit or proceeding in equity.

In my opinion, no leave would have been necessary to take this appeal; but, in case it were, application might have been made either to the Supreme Court or this Court under sec. 48 (e)\* of the Act.

Assuming that we still have the power, under sec. 71 of the

\*48. No appeal shall lie to the Supreme Court from any judgment of the Court of Appeal for Ontario, unless,—

(e) special leave of the Court of Appeal for Ontario or of the Supreme Court of Canada to appeal to such last-mentioned Court is granted.

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Supreme Court Act, to extend the time and allow the appeal, I am strongly of the opinion that it should not be done. It seems to be eminently a fitting case for the application of the old maxim, *interest reipublicæ ut sit finis litium*. Instead of taking an appeal within sixty days after the judgment of the 21st April, 1908, as they had a right to do, the company chose to acquiesce in the judgment, and to take their chances of shewing on the reference what they had previously claimed, namely, that the stock and bonds in question were really of no value. Having failed to convince the Referee of this, or to convince the High Court or this Court, on the respective appeals to them, they are now proceeding with their appeal to the Supreme Court from the judgment of this Court of the 28th September, 1911. This they have a perfect right to do; and, if they succeed, they will be entitled to the full benefit of such relief as they may obtain. But it is quite another question when they come, after four years of litigation, and after having put the plaintiffs to the expenditure of large sums of money and a large amount of labour, and now ask leave to do what they should have done four years ago, if at all, and attempt to re-open the question that was then practically closed.

The officers of the company state in their affidavits that they were advised by their solicitor that they could not appeal from the judgment of the 21st April, 1908, until the amount of damages was ascertained and fixed so as to make it final; while the solicitor in his affidavit does not go so far, but says that, on account of the reference being directed by the Court of Appeal in the said judgment of the 21st April, 1908, it was not thought advisable to appeal at that time to the Supreme Court, as the same was not a final judgment.

It was not suggested to us on behalf of the applicants that this was a case that might come under sec. 48 (e) of the Supreme Court Act; we were asked to grant the extension under sec. 17, which allows us to do it "under special circumstances."

It is true that, in construing Con. Rule 353, as to an extension of the time for appealing to this Court, we have never been so strict as the Court of Appeal in England under their corresponding Rule. For illustrations of their refusal to extend the time on account of a mistake by counsel or solicitors, see *International Financial Society v. City of Moscow Gas Co.* (1877), 7 Ch.D. 241;



*In re Helsby*, [1894] 1 Q.B. 742; *In re Coles and Ravenshear*, [1907] 1 K.B. 1. It is to be observed that in these cases there was no such delay as in this case; the application in each case was made shortly after the time had expired; there was no decision, as here, that it was not "advisable" to appeal at the time. There was there no deliberate choice of a particular course and a determination to take chances, as here, nor any postponement for years of what is required to be done by the statute within a limited number of days.

No precedent was cited to us where anything approaching the facts and circumstances of the present case had been held to be such "special circumstances" as would justify such an order as now asked for.

I am of opinion that the application of the company, both by way of appeal and substantive motion, should be dismissed, and that the company should be limited to the appeal which they now have pending in the Supreme Court, and to such relief as they may be able to obtain by their appeal from the final judgment of this Court, and such interlocutory judgments as may properly be brought up on such appeal.

MOSS, C.J.O., GARROW and MAGEE, JJ.A., concurred.

MEREDITH, J.A. (dissenting) :—It is well to state the material facts affecting this motion, because it is, I venture to assert, upon a very plain and distinct misunderstanding of one of the most material of them that this Court has come to the harsh conclusion that this application should be refused. The reason given for that refusal is, and is plainly stated to be, that, "instead of taking an appeal within sixty days after the judgment of the 21st April, 1908, as they had a right to do, the company chose to acquiesce in the judgment, and to take their chances of shewing on the reference what they had previously claimed, namely, that the stock and bonds in question were really of no value." How it could be imagined that the applicants chose to acquiesce in the judgment, when no one can even reasonably assert such a thing, and when no one, not even the Chief Justice of this Court when recently dealing with this motion in the first instance, ever dreamed that they had any such right of appeal,

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I feel bound to say, goes beyond my comprehension. To prevent any sort of misunderstanding, let me quote the words of the Chief Justice contained in his written judgment disposing of the motion, of the 16th day of March last: "And, in view of the several decisions on the point, found in the Supreme Court reports, which I have again read and considered, *it does not seem to be open to question that the judgment of the 21st April, 1908, falls within the prescribed category of non-final and therefore non-appealable judgments.*"

The first suggestion that that judgment might really after all have been an appealable one came from Mr. Lefroy upon his argument of this appeal; and, in all probability, but for that suggestion, this Court would have accepted and acted upon the opinion of the Chief Justice, that it was not final and was not appealable.

And so the whole fabric of this Court's conclusion, being based upon such an error in fact, must fall to the ground. If the application is to fail, it ought to fail only for some real and substantial reason.

Now let me proceed with my statement of the real facts of the case; facts regarding which there can be no substantial controversy.

The case is, in all its aspects, plainly an appealable one; the amount involved is many times greater than the minimum amount of an appealable case: the questions involved are not only serious ones of fact, but are important and difficult ones in company law; and not only did this Court differ to a very considerable extent from the trial Judge as to the relief which should be granted, but there was also some difference of opinion in this Court, one of the Judges holding that the plaintiffs' action should be altogether dismissed; so that the case was one in which an appeal might reasonably be taken, and was also one in which I find it difficult to believe that any one would have advised against an appeal.

Then it is quite plain, from the affidavits and from the circumstances of the case, that the applicants always desired and intended to appeal, but they were prevented by that which their counsel and solicitors, as well indeed as every one concerned in

the case—including, as I have said, the Chief Justice of this Court—thought was the settled practice of the Supreme Court in such a case as this, namely, that it was not appealable until after the reference, directed in the judgment now sought to be appealed against, was concluded.

And it is also quite plain to me that, had any earlier attempt to appeal been made, it would have been met with vigorous opposition by the plaintiffs, on the ground that it was premature; opposition which, I cannot but think, having regard to what has happened, would have been successful.

The plaintiffs have, of course, now changed their tune, contending that the judgment of the 21st April, 1908, was appealable, and ought to have been then appealed against; but that change, as I have mentioned, came only upon the argument of this appeal, after Mr. Lefroy's discovery of, and reference to, sec. 38 of the Supreme Court Act. But, having so changed their position, it is quite fair to take them at their word now, and to deal with the case as if their present contention were right; and as if the Chief Justice of this Court was wrong in saying, in his judgment, to which I have already referred: "I am fully sensible of the unfortunate situation which the applicants seem to occupy at present, of not having ever had an opportunity afforded them of appealing from the judgment in question to the Supreme Court, owing to the form of the judgment and the view taken by the Supreme Court as to its jurisdiction to entertain an appeal in such a case."

And, doing so, the matter stands thus: the applicants really might have appealed from the judgment of the 21st April, 1908, but did not because it was believed that no appeal would lie until after the reference—a belief which was shared in not only by foremost lawyers but foremost Judges until the argument of this appeal, however it may be since.

Parliament has conferred upon this Court power to extend the time for appealing in such a case, and it is commonly held that, in such a case as this, this Court alone has such power; and, having it, can there be any real reason, any reason not based upon a mistake as to a most material fact, why the power should not be exercised? A case in all its essentials plainly an appeal-

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able one, especially an appealable one; and one in which an appeal undoubtedly would have been taken but for the mistaken notion, so far and so high-spreading as I have mentioned, that an appeal would have been premature if taken before the reference was concluded; a mistake in which, it is quite plain, from their conduct upon the motion before the Chief Justice as well as here, the plaintiffs shared with all the goodly company it also covered.

And what can be said against it that is really substantial and true? How can the plaintiffs be injured beyond reparation in costs? If the result of the appeal should be to dismiss their action, then, by allowing them all their costs, between solicitor and client if you will, they will be left without any reasonable ground of complaint; whilst, if leave to appeal be refused in such a case, the Court imposes upon the applicants a great debt which they never owed—the gravest kind of an injustice is done to them; and gives to the plaintiffs a small fortune they never had any legal right to receive. On the other hand, if the judgment be sustained, the plaintiffs will be recompensed in costs in respect of the proceedings upon the further appeal, and have interest upon their judgment; and neither party will have any just cause for complaint. There will be some delay, but there always is in an appeal; and that delay will be no greater than it would have been if the appeal had been taken before the reference; and it cannot lie very well in the plaintiffs' mouths to complain of that delay for very substantial purposes, when their opposition to this application, based upon technical objections, has caused and is causing greater delay.

Parliament intended that the power it conferred upon this Court to extend the time for appealing should be exercised; if it is not to be exercised in such a case as this, can any one suggest a case in which it should be exercised? There has been no intended delay; that which every one considered must be done—the reference—before an appeal could be had, was being done; it is not said that there was any undue delay, against the plaintiffs' will, in prosecuting the reference; if there had been, they would have had their remedy upon it.

And the practice in regard to appeals in cases in which a



reference is directed has been and is so uncertain and unsatisfactory as to excuse almost anything and to perplex the best as well as the worst of men. I do not consider whether under sec. 38 the applicants had an immediate right to appeal against the judgment of the 21st April, 1908; there is a good deal to be said against it, especially in a case such as this, in which by the judgment the plaintiffs' final recovery is simply one for damages for breach of a contract. And I may add that the judgment of the Supreme Court in the case of *Clarke v. Goodall*, 44 S.C.R. 284, seems to me to be quite against the view that this case comes under sec. 38; and would also observe that sec. 38 is subject to and controlled by sec. 40. It is not necessary to consider that question: it is enough to accept the plaintiffs' changed views upon the subject, and to make an order accordingly extending the time under any power—whether under sec. 40 or sec. 71, or otherwise—this Court may have.

I would allow this appeal, and, consequently, allow the motion which the Chief Justice refused; in which case the applicants should eventually pay the cost of that motion, and the plaintiffs the costs of this appeal.

*Application dismissed; MEREDITH, J.A., dissenting.*

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[IN THE COURT OF APPEAL.]

RE TOWNSHIP OF ORFORD AND TOWNSHIP OF ALDBOROUGH.

*Municipal Corporations—Drainage—Extension of Existing System—Initiation of Proceedings—Report—Necessity for Petition—Inquiry—Liability—Natural Watercourses Incorporated in System—Municipal Drainage Act, 1910, sec. 77—Sufficiency of Outlet—Finding of Drainage Referee—Appeal.*

The judgment of the Drainage Referee dismissing an appeal from an assessment in respect of a proposed drainage work was affirmed.

*Per* GARROW, J.A.:—Where the work proposed is not the construction of a new drainage system, but merely the improvement and repair of an established system which, experience has proved, is defective, in that lands and roads along its course are being flooded from year to year by the overflow of waters, for which that system provides no adequate or sufficient escape, the case falls within sec. 77 of the Municipal Drainage Act, 1910, 10 Edw. VII. ch. 90, as to "repairing upon report;" and a petition is unnecessary.

Effect of the amendment of sec. 75 of the former Act, by 6 Edw. VII. ch. 37, sec. 9, and *Sutherland-Innes Co. v. Township of Romney* (1900), 30

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S.C.R. 495, *Township of Orford v. Township of Howard* (1900), 27 A.R. 223, and *In re Township of Rochester and Township of Mersea* (1901), 2 O.L.R. 435, considered.

Where small creeks, entitled in strictness to be called watercourses, have lost their natural character and become part of an artificial drainage system created under the drainage laws of the Province, the part of the system which was once a natural watercourse is entitled to no particular immunity, under the law, over the parts which are purely artificial. The whole must operate so as to discharge the waters which it gathers, at a proper and sufficient outlet.

*Re Township of Elma and Township of Wallace* (1903), 2 O.W.R. 198, and *McGillivray v. Township of Lochiel* (1904), 8 O.L.R. 446, distinguished. Section 77 of the Act should not be given a narrow construction; and its provisions justified the assessment made against lands and roads in the township of Orford in respect of a proposed extension of a former drainage work.

The contention that the proposed work did not improve the existing outlet or furnish a sufficient outlet was determined against the appellant by the Drainage Referee upon the facts, and the Court declined to interfere.

*Per* MEREDITH, J.A.:—The points raised upon the appeal involved questions of fact only; and the decision of the Referee should not be interfered with.

APPEAL by the Municipal Corporation of the Township of Orford from the report or decision of GEORGE F. HENDERSON, Esquire, K.C., Referee under the Drainage Laws for the Province of Ontario, dismissing with costs the appeal of Orford from the report of G. A. McCubbin, O.L.S., dated the 21st May, 1910, whereby he assessed and charged the sum of \$3,225 against lands and roads in Orford in respect of a proposed drainage work in a natural creek or watercourse in Aldborough.

The reasons for the decision of the Referee, given on the 8th September, 1911, were as follows:—

The drainage scheme in question on this appeal is one initiated by the Corporation of the Township of Aldborough, without a petition, for the extension of a former drainage work, known as the Pool drain, which had its outlet at a point in Aldborough, a very short distance to the west of the road between lot 3 and lot 2 in that township. The Pool drain was an improvement of a portion of a creek, known as the Kintyre creek, the headwaters of which arise some three or four miles further up in the township of Orford. Some ten miles up, in a more southerly portion of the township of Orford, there is the beginning of another creek, known as the Fleming creek, which has an outlet in the Kintyre creek at a point on lot No. 6 in the 4th concession of Aldborough.

The present intended improvement is the result of a complaint made by one Robert Graham, upon whose lands the Fleming creek joins the Kintyre creek; and the proposition is to take up the improvement of the Kintyre creek at the point to which it had already been made west of the road to which I have referred, and to straighten, widen, and deepen that creek along its course to and beyond the junction of the Fleming creek, as shewn upon the plan of the proposed work which has been filed.

There are a large number of drains in Orford tributary to the Kintyre creek, all of which have been constructed under the provisions of the Municipal Drainage Act or the Ditches and Watercourses Act. Similarly, the usual number of drains have been dug in the upper portion of Orford tributary to the Fleming creek, the improvement of which itself is marked upon the plan as the McKerracher drain. I find as a fact, on the evidence, that the flooding of which Mr. Graham complained to the council, and as the result of which he suffered in common with his more immediate neighbours, was caused by water caused to flow from lands and roads in Orford into Aldborough and brought by the Fleming creek and the Kintyre creek to the lands in Aldborough, to their detriment. I am satisfied, as a matter of law, that, in the result, lands in Orford are assessable because of this condition of things. The improved tributary to Kintyre creek has been altogether artificial down to the point at which the present work is intended to be commenced. It is a matter of particular importance, however, in view of the legal position taken by counsel for the appellant, that the Fleming creek has not been artificially improved throughout its whole length. Its artificial improvement ends at a point on lot B in the 6th concession of Aldborough, where the figures 68 appear on the plan filed as a portion of exhibit 1, that being the terminus of a proposed improvement of the Fleming creek now pending. I inspected such portions of the locality in question as the parties thought proper, yesterday, and think it proper to state that a view of the locality is of very great importance in this action; that it is so is largely because of the fact that the land is not only what is called rolling land, but rolling to a very considerable extent. The highways which we traversed are laid out along the road allowances pro-

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vided by the surveys, but one goes a very short distance at any time before coming to a steep decline in the road, reaching down to approximately the water level, and then again followed by a steep ascent to higher ground. Generally speaking, the ground surface, except as to these low places, is some fifteen to twenty-five feet higher than the level of the creek. Each of these creeks itself runs along the bed of an unusually wide depression, and care has to be taken in estimating the evidence (if transcribed) to distinguish between the banks of the creek and the edges of the waterway itself. There are large stretches of good land on either side of the waterway. The high banks occur at the outer limits of these stretches.

The matter has been argued by counsel for the appellant on the assumption that the creek in its original condition must be taken to be the land level between the high banks, no matter how far apart these may be. I do not understand that it is the intention of the law that riparian proprietors should be entitled to the natural flow of the water at times of high freshets, no matter how far back that flow would extend. If that were the case, there are certain portions of this Province where the rights of people up-stream would be so great as to prevent the cultivation of many miles of very valuable farm property; and, if the argument presented were pushed to its logical conclusion, the result would be to defeat the purposes of the Drainage Act in very many cases. There must, of course, be an application of common sense to each particular case; and, whether I am right or wrong, I always endeavour to administer the law according to the particular case; and in this particular case, throughout almost all the course of the water as I saw it yesterday, I found the high banks to be so far back from the actual waterway and the quantity of land between the high banks and the actual waterway to be so extensive and so valuable that I think the matter must be treated as if the rights of the parties depended upon the flow in the actual waterway; and I so treat it. I elaborate that idea because I think it necessary in order to enable the intention of the engineer to be carried out, that intention being to render fit for cultivation during ordinary seasons all the low-lying lands between these high banks, which are now unfitted for cultivation because of the fact that they are flooded



so frequently that it is unsafe to attempt to crop them. I cannot accept the evidence of those who say that the lands are not now flooded as seriously as they were some ten or twelve years ago. I prefer to accept the evidence of the others who say that the flooding has been increasing as the years go by. I note the fact that there has been no real attempt at cultivation of the flats for the last period of ten years or thereabouts, and that apparently there was some attempt at cultivation of portions of the flats before that time. I do not seriously regard the position of the witness who is still cultivating an acre of his flats. That is the witness D. McMillan, if I recollect rightly. His case illustrates the care that has to be taken in considering the situation as it is on the ground. I can quite appreciate that from his point of view there is no particular injury because of water brought down, because his flat land is so irregular in its natural conformation that it would be very difficult to cultivate it even if it had perfect drainage. I can quite appreciate the position of his namesake, higher up, who has 290 acres of land and does not regard as a matter of consequence the injury to a couple of acres only of that large tract which he has never wanted to cultivate. A portion of it is in rough bush or slash, and it answers for pasture at the upper end of his farm. So, too, with some of the others who were called. They are men who do not want to pay the charges which the engineer has imposed upon them. If they had less land, and required to cultivate the land they had, they would probably feel differently from what they do feel. In estimating the evidence of witnesses of that class, one has to regard their actual condition. The fact remains that damage is occasioned to the lands of Mr. Graham and his neighbours, and that Mr. McCubbin proposes to do away with that damage by the very simple expedient of straightening, widening, and deepening the creek through their lands. Some of these men have already had sufficient enterprise to do that sort of thing on their own lands, although they have not done it to the extent which would be necessary in connection with the larger scheme now under way. For that the engineer gives them credit. The engineers agree, as they must agree, that the fact that there are many windings in the stream is a very important element causing damage.

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Coming back to the question of legal liability, I am satisfied that the matter has resolved itself into the application of the judgment of the Court of Appeal in the case of *Township of Orford v. Township of Howard* (1900), 27 A.R. 223. In fact, I am told by counsel for the respondent that Mr. McCubbin had that decision in view in making the report which he has made, and that he was advised that he could not make the report had it not been for that decision. As I understand it, the Court of Appeal there holds that there may be an assessment for injuring liability, where, as a matter of fact, lands are injured by water brought down artificially from high lands, although not brought down to the actual point where the injury occurred, which is important here in view of the fact, already noted, that there is a considerable portion of the Fleming creek which is yet in a state of nature, and which is located between the now proposed improvement of the Fleming creek and its junction with the Kintyre creek. I find, on the evidence, as I have already stated, that the injury is caused by the waters which come down the Fleming creek, as well as by the waters which come down by the Pool creek. And, if I am right in my understanding of this decision, the result of that finding is, that lands in Orford to which these waters come are assessable, as a consequence. It is contended that, because the proposed improvement of the Fleming creek drain finds an outlet, within the meaning of the Act, at station 68, to which I have referred, there can be no liability attaching to lands in Orford beyond that point. At first blush that would seem to be a very formidable contention, but there again I apply the knowledge gained on the inspection and note that the improvement of the Fleming creek drain, for the small section over which it is being improved, is for a strictly localised purpose, which has no effect at all upon the facts which lead to liability in this case. At the point where the Fleming creek is being improved, there is one of the dips of country to which I have referred, and there is a short, comparatively short, space through which the highway is very materially affected by reason of the overflow of that creek. The improvement there will not materially affect the flow of water down Fleming creek. It will result in enabling the township corporation to take proper care of its roads, and will, of course,

be of some benefit to or perhaps relieve from injury some of the adjacent lands; but it will not either prevent or to any appreciable extent facilitate the flow of the water from Orford which occasions damage to the lands in Aldborough now in question. It will, of course, bring down more water which would otherwise be evaporated, but the amount will be so small in comparison with the whole volume of water with which we are concerned, that I cannot feel that it should weigh in the determination of this present appeal.

Dealing with the question of whether or not the old outlet of the Pool drain is sufficient, I am satisfied, as the findings I have already made indicate, that it is not and never has been a proper outlet for the waters which are conducted to it. It may be that the assessment as to waters tributary to the Kintyre creek in Orford would be more properly outlet assessment; but, in view of the fact that there is no practical difference in this case in the result between the assessment for outlet liability and assessment for injuring liability, I have not thought it fit to suggest any alteration in the report. Had there been any practical difference so as to necessitate a re-adjustment of the assessment, I might possibly have thought fit to suggest that. But, however one regards it, the result is the same. There are waters brought to the old outlet, and which flow beyond it, causing damage to lands below. These waters occasion injury, and the engineer is justified in relieving them and in assessing the lands which cause the injury accordingly.

It may be convenient shortly to state the practical distinction between injuring and outlet liability, in view of the fact that many lawyers and most engineers complain of difficulty in understanding it. Where lands can be more effectively drained after the construction of the drainage work than before, because they will then have an outlet which they did not have before, they are assessable for outlet liability. Where lands are effectively drained, but where their waters are not taken to a sufficient outlet, so that legally speaking they have no outlet at all, and the drainage work will give them a sufficient outlet, they are again assessable for outlet liability. The test is, that, in order to enable an assessment for outlet liability, the drainage work

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must be necessary, in fact or law, to enable or improve the cultivation or drainage of the land assessed.

Where, in the course of his examination, the engineer finds lands suffering injury from water brought from upper lands by artificial means, and his proposed work will pick this water up and carry it to a sufficient outlet, he can assess for injuring liability the lands from which the water causing the damage is so artificially brought. This is usually on pretty much the same state of affairs as the second kind of outlet liability, but from the opposite point of view, the test now being the existence of injured lands seeking relief, not higher lands seeking outlet. It follows that the extent of liability differs in each case, as set out in the respective sections.

An attack is made upon the engineer's principle of assessment, and it is said that he erred in arriving at his assessment for injuring liability, leaving his assessment for outlet liability to follow, and that for benefit to follow again. I do not so understand the evidence of the engineer. That evidence was given when he was under cross-examination, and when he was endeavouring to answer, to the best of his ability, leading questions such as counsel would put to him in cross-examination. It was counsel for the appellant who took up the question of injuring liability first, and I do not understand that the engineer did so. I noticed that he used the phraseology of the statute in answering questions put to him, shewing that he knew what he was talking about, and knew what he was doing when he made the assessment. I am satisfied, as a result of his evidence, that his charge for injuring liability was limited to the extent of the cost of the work necessary for the relief required; but I do not understand that he assessed to that extent. I have no warrant for holding, on the evidence, that there was anything wrong about the engineer's principle of assessment; although, perhaps, it is proper that I should say that I agree with counsel for the appellant that, while the Act says that the assessment may be to the extent of the cost of the work necessary for the relief of the injured lands, it does not at all follow that it should be so. Benefit should first be taken into account, and then outlet liability, and then injuring liability, although probably



in many cases, as was the case here, in practical result, outlet liability and injuring liability will run side by side.

Another contention of the appellant is, that the scheme is not continued to a sufficient outlet, within the meaning of the Act. I cannot so find upon the evidence. Mr. Laird and Mr. Manigault compare it with the present Pool outlet, but overlook the all-important distinction that in the one case lands below are injured and in the other no injury is anticipated by either the engineer or the owners of the lands below. Again, the particular facts of the particular locality become important.

I am also asked to find, on the evidence, that the assessment on lands in Orford is excessive. The total cost of the work, apart from a certain branch which is assessed exclusively upon Aldborough, is \$6,645. For injuring liability lands in Aldborough are assessed at \$1,094 and lands in Orford at \$3,225. There is a small assessment for outlet liability, \$126, on lands in Aldborough, and an assessment of \$2,200 for benefit on lands in Aldborough. No evidence has been called to criticise the assessment for injuring liability on lands in Orford. The principle, of course, has been attacked. At first blush, again, the amount might seem large; but, when one thinks of the very large area which is very well drained by the two creeks and their tributaries, it is not surprising that the engineer has found it necessary to impose an assessment to the amount of \$3,225. I cannot, on the evidence, say that he has in any way erred in that respect.

In the result, therefore, the appeal must be dismissed, with the usual result as to costs, and the costs in this case shall be on the scale of the High Court. The excess costs of the respondents, as between solicitor and client, shall be chargeable against the drainage scheme as a whole. The party and party costs of the respondents shall be chargeable against the lands in Orford. The solicitor and client costs of the appellant shall be chargeable against the lands in Orford.

April 15 and 16, 1912. The appeal was heard by Moss, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

*M. Wilson*, K.C., for the appellant. The decision of the learned Drainage Referee was based upon the previous decision

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of *Township of Orford v. Township of Howard*, 27 A.R. 223, which, as we contend, was not properly appreciated by him. The lands in Orford could not be assessed for outlet liability, and no such assessment was in issue at the trial, the assessment being for injuring liability alone. Here the burden is on the respondent to shew that the appellant should pay for work done in the respondent township. It is submitted that the work in question could not legally be done without a petition; and that, even if it could lawfully be so done, the facts of the case do not warrant it. As to the necessity for a petition, see the Municipal Drainage Act, sec. 3, sub-secs. 3 and 4, and sec. 77. There must be initiation on the part of the council in order to justify the work. The work in question is not desired by the appellant, and is useless to it, and the scheme should be set aside, as was done in *In re Township of Raleigh and Township of Harwich* (1899), 26 A.R. 313. Reference was also made to the following authorities: *Sutherland-Innes Co. v. Township of Romney* (1900), 30 S.C.R. 495, at pp. 516-518, which was considered in *In re Township of Rochester and Townships of Mersea* (1901), 2 O.L.R. 435, at p. 439; *In re Townships of Orford and Howard* (1891), 18 A.R. 496, which was approved by Osler and Maclellan, J.J.A., in *In re Township of Harwich and Township of Raleigh* (1894), 21 A.R. 677, and followed in *Broughton v. Township of Grey and Township of Elma* (1897), 27 S.C.R. 495; Angell on Watercourses, 7th ed., sec. 108 (j), p. 134, also p. 6, and cases there cited. [GARROW, J.A., referred to *Young v. Tucker* (1899), 26 A.R. 162.]

*C. St. Clair Leitch*, for the respondent, referred to secs. 77, 64, and 3 (3) of the Municipal Drainage Act, 1910 (10 Edw. VII. ch. 90), as giving the right to perform the work and make the assessment. Under sec. 77 no petition is required: *Re Township of Dover and Township of Chatham* (1909), 1 O.W.N. 327. [MEREDITH, J.A., referred to *Re Johnston and Township of Tilbury East* (1911), 25 O.L.R. 242.] The question at issue is concluded by the *Orford and Howard* case in 27 A.R., *supra*, where the previous cases are discussed: see especially the judgment of Lister, J.A., at p. 230. He also referred to *Young v. Tucker*, *supra*, and to *McGillivray v. Township of Lochiel* (1904), 8 O.L.R. 446.

*Wilson*, in reply, referred to *Re Township of Elma and Township*

of *Wallace* (1903), 2 O.W.R. 198, and *In re Township of Caradoc and Township of Ekfrid* (1897), 24 A.R. 576, 581, and argued that the *Orford and Howard* case was not applicable to the circumstances of the present case.

June 28. GARROW, J.A.:—The facts are very fully set out in the judgment of the learned Referee, in the course of which he says:—

“Dealing with the question of whether or not the old outlet of the Pool drain is sufficient, I am satisfied, as the findings I have already made indicate, that it is not and never has been a proper outlet for the waters which are conducted to it. It may be that the assessment as to waters tributary to the Kintyre creek in Orford would be more properly outlet assessment; but, in view of the fact that there is no practical difference in this case in the result between the assessment for outlet liability and assessment for injuring liability, I have not thought it fit to suggest any alteration in the report. Had there been any practical difference so as to necessitate a re-adjustment of the assessment, I might possibly have thought fit to suggest that. But, however one regards it, the result is the same. There are waters brought to the old outlet, and which flow beyond it, causing damage to lands below. These waters occasion injury, and the engineer is justified in relieving them and in assessing the lands which cause the injury accordingly.”

This seems tersely to epitomise the case with which we are called upon to deal.

Counsel for the appellant addressed us very fully and very ably upon certain objections, all of which are in their nature objections going to the jurisdiction of the council. These, briefly stated, are: (1) that the proceedings should have been initiated by petition, and not by report without petition; (2) that the work proposed is useless to Orford lands, which already have a sufficient discharge by the works already constructed, and for the construction of which the land-owners in Orford have paid their share; (3) that the Orford lands discharge into natural watercourses, with defined banks, and are for that reason not liable for the proposed work; (4) that the proposed work does not improve the present outlet or furnish a sufficient outlet.

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There were also objections as to the details of the assessment and upon the merits generally, all of which were very fully dealt with by the learned Referee, with a knowledge and experience in such matters to which I cannot pretend; and I, therefore, content myself with a general agreement with his conclusions as to them.

Dealing now with the objections to the jurisdiction before-mentioned, and taking them in their order, I am quite unable to follow the learned counsel in his contention that a petition was necessary. The contention necessarily implies that, if there had been a petition, the objection would fail. I could more easily understand an argument that, even upon petition, the circumstances are such that the relief could not lawfully be granted; and that, that being so, there could be no relief, either upon petition or report—in view of the fact which we have here of an intervening watercourse. Such an argument would have had some show of virtue, and even of authority (see *In re Township of Rochester and Township of Mersea*, 2 O.L.R. 435), under the old and narrower construction of sub-sec. 3 of sec. 3 of the Municipal Drainage Act, 1910, by reason of the absence from it of the words “either directly or through the medium of any other drainage work or of a swale, ravine, creek or watercourse,” which are in sub-sec. 4. The “any means” in sub-sec. 3 did not, so it was held, include a “swale, ravine, creek or watercourse”—always, it seems to me, an excessively narrow construction. But, if it be granted, as it apparently is, that the relief required could be obtained on petition, the objection seems utterly to vanish. What is proposed is not the construction of a new drainage work, but merely the repair and improvement of an established system which, experience has proved, is defective, in that lands and roads along its course are being flooded from year to year by the overflow of waters for which that system provides no adequate or sufficient escape. Such a case seems to me very clearly to fall within the express provisions of sec. 77 of the Municipal Drainage Act as to “repairing upon report.”

In considering such cases as *Sutherland-Innes Co. v. Township of Romney*, 30 S.C.R. 495, and *Township of Orford v. Township of Howard*, 27 A.R. 223, both of which were much discussed before us, it should be remembered that this section, which is



the old sec. 75, was very materially amended after both these decisions, by 6 Edw. VII. ch. 37, sec. 9, so as to be made expressly to apply to the case of the better maintenance of a natural stream, creek, or watercourse, which had been artificially improved by local assessment or otherwise in the same manner and to the same extent and by the same proceedings as are applicable to the better maintenance of a work wholly artificial. The effect of this amendment is very wide. It destroys at one blow the value of much that was said in *Sutherland-Innes Co. v. Township of Romney*, never in some respects an entirely satisfactory decision: see *per* Armour, C.J.O., in *In re Township of Rochester and Township of Mersea*, before cited, 2 O.L.R. at p. 436; it restores the authority of *Township of Orford v. Township of Howard* as an exposition of sub-secs. 3 and 4, which had been shaken by the *Sutherland-Innes* case; and, quite apart from these, and from all the other cases decided before the amendment, it apparently gives a new and substantive right, directly applicable to the facts and circumstances which here appear.

It would, perhaps, have been better if the Legislature had expressly made the words which I have quoted from sub-sec. 4 applicable also to the previous sub-section. To have done so would, at least, have saved some rather hair-splitting arguments upon the subject to which the Courts have had from time to time to listen. There is, upon the face of things, no good reason why injuring liability should stand upon one foundation and outlet liability upon another and a different one. It must surely often happen that certain sections or lots in a drainage scheme are liable for both. In *Township of Orford v. Township of Howard*, Lister, J.A., apparently with the concurrence of the other members of the Court, held that the amendment of sub-sec. 4 by the introduction of these words had had the effect of also enlarging the meaning of sub-sec. 3—a conclusion fortified and put beyond question by the subsequent amendment, which, while not primarily directed to sub-sec. 3, is directed to another and a minor phase of the same subject-matter.

The second and third objections, which are somewhat related, may perhaps be conveniently considered together.

It is not, in my opinion, necessary in this case to discuss the general question of the riparian right of drainage into natural

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watercourses for the purposes of agriculture. The facts in the cases of *Re Township of Elma and Township of Wallace*, 2 O.W.R. 198, and *McGillivray v. Township of Lochiel*, 8 O.L.R. 446, to which counsel referred and upon which he relied, were very different. Fleming creek and Kintyre creek, both, although small, entitled in strictness to be called watercourses, long ago lost their natural condition and became part of an artificial drainage system created under the drainage laws of the Province. The law permits that to be done. And, when it is done, the part of the system which was once a natural watercourse is entitled to no particular immunity, under the law, over the other parts which are purely artificial. The whole must operate so as to discharge the waters which it gathers, at a proper and sufficient outlet. The law at least aims at affording complete relief from the common enemy, and not merely a nominal or paper relief, or the relief of one section of the locality at the expense of another. And until this main object is secured, I see nothing in the Act pointing to the finality upon which so much of the argument was based. Section 77 provides that "Wherever, for the better maintenance of any drainage work constructed under the provisions of this Act or any Act respecting drainage by local assessment, or to prevent drainage to any lands or roads it is deemed expedient to change the course of such drainage work, or make a new outlet for the whole or any part of the work, or otherwise improve, extend, or alter the work . . . the council . . . may . . . undertake" the work.

These words are very large, but not too large for the accomplishment of the very desirable purpose aimed at by the Legislature; and they should not, in my opinion, be narrowed by the construction for which the appellant contends.

The remaining objection, of the insufficiency of the proposed outlet, is a question of fact depending upon the evidence, and was determined against the appellant by the learned Referee. The learned Referee, in the course of his judgment, points out the importance in this case of a personal inspection which he had made. Whether or not his conclusion upon this objection was affected by the inspection does not, I think, appear; but, however that may be, while the finding is not in some respects entirely satisfactory, I am not convinced that it is erroneous.

And I reach this conclusion with the less regret because the objection does not appear in the written notice of objections served by the appellant, which contains some thirteen other objections. If it had, it is quite possible that further and more satisfactory explanations would have been forthcoming.

Upon the whole, the appeal, in my opinion, fails, and should be dismissed with costs.

MEREDITH, J.A.:—I desire to say that, as they appear to me, all the points raised, and argued at such length, on this appeal, involve, when properly looked at, questions of fact only.

The question whether the scheme was properly launched without a petition, is simply a question whether, on its facts, that scheme came within the provisions of sec. 77 of the drainage enactment.

Upon such a question, the finding of the Drainage Referee, who had all the ordinary advantages of a trial Judge, as well as the advantage of a personal inspection of the locality and of the work—especially when that finding is in accord with the drainage engineer's judgment—is not lightly to be reversed in any Court of Appeal, even if otherwise one might be inclined to reach a different conclusion, which I am not: and so the appeal fails upon that branch of it.

So, too, as to the sufficiency of the outlet, and also as to the method of assessment, and the amount of the several assessments.

The provisions of the drainage enactment ought not to be employed to such an extent as to be oppressive or unreasonably burdensome; the duty of municipal councils is, or ought to be, a safeguard against that; nor should unauthorised methods be taken to effect that which cannot be effected by authorised methods; the Courts should prevent that; but there is, as far as the evidence shews, nothing objectionable in this case in these respects.

I concur in dismissing the appeal.

MOSS, C.J.O., MACLAREN AND MAGEE, JJ.A., also concurred in dismissing the appeal.

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*Appeal dismissed.*

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[IN THE COURT OF APPEAL.]

## BATEMAN V. COUNTY OF MIDDLESEX.

*Damages—Personal Injuries—Assessment of Damages by Trial Judge—  
Appeal—Reduction of Amount Assessed.*

The amount of the plaintiff's damages for personal injuries sustained by reason of the negligence of the defendants, assessed at \$12,500 by RIDDELL, J., whose judgment (24 O.L.R. 84) was affirmed by a Divisional Court (25 O.L.R. 137), was reduced by the Court of Appeal to \$10,000; MEREDITH, J.A., dissenting.

*Per GARROW, J.A.*:—A finding as to damages can stand upon no other footing than any other finding made by a Judge trying the case without a jury; the Court has the power to interfere and it is its duty to interfere with the finding where it is erroneous; there is a difference between a finding by a Judge and a finding by a jury.

*Jones v. Hough* (1879), 5 Ex.D. 115, 122, followed.

Discussion of the evidence and the proper measure of damages.

*Phillips v. South Western R.W. Co.* (1879), 4 Q.B.D. 506, 5 Q.B.D. 78, specially referred to.

APPEAL by the defendants from the order of a Divisional Court, 25 O.L.R. 137, dismissing an appeal (upon the question of the quantum of damages) from the judgment of RIDDELL, J., 24 O.L.R. 84, after a trial without a jury, awarding the plaintiff \$2,500 damages, in an action for personal injuries caused by the negligence of the defendants.

April 18. The appeal was heard by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

Sir George C. Gibbons, K.C., and J. C. Elliott, for the defendants. The defendants admit their liability, and the only question is as to the *quantum* of damages, which, it is submitted, the learned trial Judge, and the Divisional Court, have fixed at much too high a figure. The latter Court has found that the amount is larger than it would have awarded had the case come before it in the first instance. According to the evidence of the plaintiff's own physician, the most serious trouble caused by the accident was the infected gall bladder, and the consequent probability that gall stones might develop; but this is only a chance, and the defendants offer now, at their own expense, to have an examination made by an independent physician, which will shew whether or not this condition has developed. [J. M. McEvoy, for the plaintiff, refused to accept this offer at present, as the injury to the kidney was an even more serious



matter.] Not much stress was laid upon the movable kidney by the plaintiff's physician, and there is no direct evidence that it was the result of the accident. Many people have the trouble, and know nothing about it; and it is a mere inconvenience unless it goes too far. The affection does not appear to be increasing; and the defendants are willing that the proposed medical examination should cover this point also. The evidence as to the alleged diminution of the plaintiff's earning power is very unsatisfactory, and it is not shewn what the effect of giving up a country for a town practice would be. The verdict is a very large one, even if all the anticipated consequences of the injury were certain, which is far from being the case. They referred to *Beal v. Michigan Central R.R. Co.* (1909), 19 O.L.R. 502, 506; *Hood v. Eden* (1905), 36 S.C.R. 476, 483.

*T. G. Meredith*, K.C., and *J. M. McEvoy*, for the plaintiff. The learned trial Judge had peculiar advantages for estimating the weight of the medical testimony and the extent of the plaintiff's injury, and there is no good reason for interfering with his conclusions. Damages in such a case should not be unduly minimised; and the trial Judge, who saw the plaintiff and heard his testimony, was in a better position to give a correct estimate than the Judges of this Court can be. The true principle is laid down in *Bradenburg v. Ottawa Electric R.W. Co.* (1909), 19 O.L.R. 34, 37, where *Johnston v. Great Western R.W. Co.*, [1904] 2 K.B. 250, is referred to. [GARROW, J.A., thought that was a very unique case.] The infected gall bladder and the movable kidney were the two most serious injuries. The latter is of two kinds, congenital and traumatic, the last-mentioned being the more serious, and, according to the trial Judge, that with which the plaintiff is affected. The judgment of the trial Judge is supported by the evidence, and, affirmed as it is by the unanimous judgment of the Divisional Court, should not be set aside.

*Gibbons*, in reply, argued that the alleged distinction between the two kinds of movable kidney was not borne out by the evidence.

June 28. GARROW, J.A.:—The action was brought against the defendants to recover damages sustained in consequence of

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the want of repair of a highway under the charge and control of the defendants. The learned Judge awarded the sum of \$12,500 as damages; and the only question really before us is whether or not such sum is excessive. The judgment of Riddell, J., is in 24 O.L.R. 84. No written judgments were apparently delivered in the Divisional Court, so that we are pretty much in the dark as to the view there taken.\*

In the reasons for appeal it is said, apparently without contradiction from the other side, that some members of the Court expressed the opinion that, although the damages were much larger than they would have given, they would not interfere because the verdict is not so perverse and unreasonable that, if the case had been tried by a jury, twelve intelligent men might not have arrived at the same conclusion. It is, of course, dangerous to trust in such a matter to the recollection of counsel, who may not remember accurately the whole statement. All, therefore, that I can say upon the subject is, that, if such a statement was made and was the foundation for the judgment, it does not express my view of what the law is upon the subject, because it apparently fails to discriminate between a trial by a Judge alone and a trial by a Judge with a jury.

The distinction is very clearly expressed by Bramwell, L.J., in *Jones v. Hough* (1879), 5 Ex. D. 115, at p. 122, where he is reported to have said: "If, upon the materials before the learned Judge, he has, in giving judgment, come to an erroneous conclusion upon certain questions of fact, and we see that the conclusions are erroneous, we must come to a different conclusion, and act upon the conclusion that we come to and not accept his finding. I have not the slightest doubt such is our power and duty. A great difference exists between a finding by the Judge and a finding by the jury. Where the jury find the facts, the Court cannot be substituted for them, because the parties have agreed that the facts shall be decided by a jury; but where the Judge finds the facts, there the Court of Appeal has the same jurisdiction that he has, and can find the facts whichever way they like. I have no doubt, therefore, that is our jurisdiction, our power, and our duty."

\* See the brief report of the judgment of the Divisional Court, 25 O.L.R. 137.

This language has been quoted more than once with approval in Canadian Courts: see *North British and Mercantile Insurance Co. v. Tourville* (1895), 25 S.C.R. 177, at p. 193; *Pren-tice v. Consolidated Bank* (1886), 13 A.R. 69, at p. 74; see also the remarks of James, L.J., in *Bigsby v. Dickinson* (1876), 4 Ch.D. 24, at p. 29. And a finding as to damages can stand upon no other footing than any other finding made by a Judge trying the case without a jury.

What is a reasonable sum is always to me a difficult question, from answering which I would gladly escape if consistent with my duty. The principles deducible from the cases of authority upon the measure of damages do not, in my experience, go very far in helping one except along general lines. The real difficulty is, that, within these lines, there is almost always so much reason for honest difference of opinion.

The question of the proper measure of damages in such cases as this was much discussed in the well-known case of *Phillips v. South Western R.W. Co.* (1879), 4 Q.B.D. 406, affirmed in 5 Q.B.D. 78. That was the case of a surgeon of middle age, with a very large professional income, said to have been about £5,000 net *per annum*. The injury of which he complained had rendered his condition absolutely helpless, with no hope that he would ever be able to resume practice. The charge of Field, J., to the jury, at the first trial, was, after much discussion, in the end upheld as a correct guide upon the law of the case. In it he said (5 Q.B.D. at p. 79): "Perfect compensation is hardly possible, and would be unjust. You cannot put the plaintiff back again into his original position, but you must bring your reasonable common sense to bear, and you must always recollect that this is the only occasion on which compensation can be given. Dr. Phillips can never sue again for it. You have, therefore, now to give him compensation, once for all. He has done no wrong; he has suffered a wrong at the hands of the defendants, and you must take care to give him full, fair compensation for that which he has suffered." And upon the subject of the loss of income, a question also involved in this case, he said (p. 81): "You are not to give the value of an annuity of the same amount as the plaintiff's average income for the rest of the plaintiff's life. If you gave that you would

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be disregarding some of the contingencies. . . . An accident might have taken the plaintiff off within a year. He might have lived, on the other hand, for the next twenty years, and yet many things might have happened to prevent his continuing his practice." At the first trial a verdict was rendered by the jury for £7,000 damages, which was set aside, at the instance of the plaintiff, as too little, and a new trial directed. Upon the second trial, the jury gave a verdict of £16,000, which was also moved against, this time by the defendants, as excessive, but the Court refused to interfere. See *Phillips v. London and South Western R.W. Co.* (1879), 5 C.P.D. 280. And see also *Church v. City of Ottawa* (1894), 25 O.R. 298, affirmed in this Court in (1895), 22 A.R. 348, which was also the case of an injury to a physician.

That the present plaintiff sustained a severe injury, from the effects of which it is improbable, at his time of life, that he will ever fully recover, is beyond question. But that he will so far recover as to be able to resume the practice of his profession, in a somewhat modified form perhaps, within a comparatively short period, is, I think, the fair result of the evidence. The three items of injury which bulk the largest are thus summed up and commented upon by Riddell, J.: "The difficulty at the liver may perhaps—probably—be overcome by a surgical operation of a comparatively simple character; the neurasthenia may be expected to be fairly well overcome in about a year longer—but the prolapsed kidney is another story;" the learned Judge evidently regarding the latter as the most serious of them all.

Prolapsed or movable kidney is, it appears from the evidence of the medical experts, a by no means uncommon condition, not always, not, I would infer, usually or necessarily, a very disabling defect, since patients may be so affected for very long periods, and even for life, without ever becoming aware of it. In the plaintiff's case it was not discovered until some six weeks after the accident—after he had gone to the baths at Mount Clements, although before that he had been examined more than once by local physicians, and was himself one of long experience. Dr. Primrose, in his statement, says that the prolapsed condition may or may not have been caused by the acci-



dent. And I am not able to find in the evidence of the other medical witnesses any more positive evidence or evidence which displaces this statement. And, if the matter rests as put by Dr. Primrose, as, in my opinion, it does, the fact is not established, for, of course, the burden of proof is upon the plaintiff, who must incline the balance in his direction, not by a mere scintilla but by a reasonable amount of legal evidence. In this connection, that is, the condition of the plaintiff's kidneys before the accident, the evidence of Mr. Robertson, a wholly disinterested witness, also is of some importance, who said that several months before the accident the plaintiff told him that he was being troubled by his kidneys, and that his hard work and hard driving were using him up. The plaintiff denies this, and says there was never even a conversation, and that he was never troubled with his kidneys; but, as between the two, there is no reason why the usual rule as to crediting the disinterested witness should not be followed. But while, for these reasons, I incline to think that the evidence as it stands does not warrant the conclusion that it is established that the prolapsed condition of the kidney was caused by the accident, I think it highly probable that, as the blow which the plaintiff received was in its vicinity, the kidney was injured to some extent in the accident, since there is evidence of blood and pus in the urine, which could not otherwise be reasonably accounted for.

The plaintiff was not able to point to any decided diminution in income as the result of the accident, although it would be natural to expect a falling off to some extent. And it is quite probable that, although the plaintiff will resume practice, he may have to decline the more arduous work to which he has been accustomed, elements which, of course, very properly enter into a consideration of the amount of damages, and which I have, I hope, duly considered.

Upon the whole, after, in the language of Field, J., applying to the circumstances such reasonable common sense as I possess, I have, with deference, come to the conclusion that the amount awarded at the trial is substantially too large, and should be reduced. And the amount I would consider fair and just, under all the circumstances, would be \$10,000, which, if it errs at all, as it probably may seem to do, to the minds of the next appellate

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tribunal, errs, I think, as I believe we all do, on the side of being generous to the plaintiff.

The plaintiff should have the costs up to and inclusive of the trial, and there should be no costs to either party of the motion in the Divisional Court or of this appeal.

MOSS, C.J.O., MACLAREN AND MAGEE, JJ.A., concurred.

MEREDITH, J.A. (dissenting):—I am unable to agree in the views which have just been expressed regarding the abnormal condition of the kidney; there seems to me to be no sufficient reason for rejecting the finding of the trial Judge—that it is a case of traumatic prolapsus. A trial Judge's findings are not lightly to be disturbed; and, in saying that the trial Judge in this case was one more than ordinarily well-fitted for determining such a question, I am but giving evidence which I am quite sure would be corroborated by the other members of the bench. But, even quite apart from any such finding, I would have no difficulty in reaching the same conclusion as that to which the trial Judge came upon this question of fact. The man met with an accident which, on all hands, it is admitted, might well have caused this particular injury, and, in due course, after that accident, it was discovered. Is it unreasonable, even in these circumstances alone, to attribute the injury to the accident? But there is very much more than that on which to support the finding. It is proved, beyond question, that blood and pus were found in the man's urine after the accident; an abnormal condition which unquestionably was likely to follow a traumatic injury to the kidney; and most of the medical witnesses attribute the abnormal condition to the accident, while there is not one who gives his opinion that it is not so attributable. Against all that, what is there? The statement of a witness, denied by the plaintiff, that the plaintiff, at some time before the accident, said that his kidneys were troubling him and that the long drives were using him up. But what kind of evidence is that, that the man then had one prolapsed kidney? There are not a few of mankind who, if they told the truth, would be obliged sometimes to say that their kidneys were troub-

ling them, and that without any kind of prolapsus or other serious ailment. To reject the finding upon such evidence merely would be plainly erroneous; and nothing else is relied upon except the negative statement, contained in the report of Dr. Primrose, that "it may or may not have been caused by the accident;" a statement which hardly calls for an answer; but, if it did, would be more than off-set by Dr. Primrose's own evidence, given, under oath, afterwards at the trial—that, whatever injury there is to the kidney, it was caused by the accident, as the pus and blood shewed; see p. 67 of the appeal-book.

The finding of this Court in this respect, reversing the finding at the trial, being placed solely upon that which I have, I think, plainly shewn to be an error, I cannot concur in the judgment just pronounced, but must dissent, agreeing, as I do quite, with the trial Judge.

Then, upon the facts as found by the trial Judge, is there any good reason in law for interfering with his assessment of the damages?

The findings of a trial Judge do not, of course, stand quite upon the same footing as the verdict of the jury; though the Lord Chancellor, in the recent case of *Lodge Holes Colliery Co. v. Wednesbury Corporation*, [1908] A.C. 323, at p. 326, seems to have said something like that they do. There is no appeal against the verdict of the jury; there is an appeal against the findings of a trial Judge; the assessment of damages by a jury cannot be changed by the Court; the assessment of damages by a Judge may be. But, though there is an appeal against the findings and the assessments of the Judge, such an appeal is not to be treated as a new trial; his conclusions must stand unless they are plainly shewn to be wrong; and, in dealing with every such appeal, the great advantage of a trial Judge, who sees and hears the witnesses and before whom the whole trial takes place, over any court of appeal, in seeking the truth as to all questions of fact, is always to be borne in mind, and to have much weight in supporting his findings.

I can find no good reason for saying that any of the trial Judge's findings of fact, in this case, are wrong; they may, of course, be; neither men nor courts are infallible; but, according

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to the evidence adduced upon the trial of this case, they are not, and that is all we can go upon; and no Judge of this Court has found fault with any of such findings, except that which I have already dealt with, and as to which I have declined to fall in with them in upsetting.

And, upon such findings, and having regard to such cases as *Phillips v. London and South Western R.W. Co.*, *supra*, and *Church v. City of Ottawa*, *supra*, I find it impossible to say that the trial Judge was wrong in assessing the damages at \$12,500. There was evidence of loss of earnings, which, if fully credited, would have warranted a much larger verdict, but it is not certain enough for that; and there was evidence of serious permanent physical injury, and of continued pain and suffering. Damages are not to be a full compensation in every respect, but only reasonable compensation under all the circumstances of the case. Upon the findings of the trial Judge, I am quite unable to say that the damages awarded were quite unreasonable, or that they are not quite reasonable, compensation under all the circumstances.

If I could agree with this Court that the man's kidney was prolapsed, and his driving days ended, before the accident, I would be obliged to say that \$10,000 damages is an excessive assessment, and that it ought to be very largely reduced, because this organic ailment is, according to the evidence, the really serious one; and if his driving days were already done, he would have been obliged to give up his large country practice anyway, almost the whole source of his income.

And I feel bound to point out that the logical result of the judgment of this Court is, that the damages assessed at the trial were in amount largely inadequate, because if, after eliminating the kidney ailment as a factor, \$10,000 be right, then, including it, as the trial Judge did, the damages should be more than \$12,500, for that ailment is more serious than all the other three put together, especially regarding money loss: as to two—neurasthenia and pleurisy—they were generally treated, by the medical witnesses, as of comparatively little importance, already well on the way to full recovery; and the other—infected gall bladder—also of much less consequence, being said by one of



the medical witnesses to be a comparatively trivial matter, which "a small operation would get rid of."

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*Appeal allowed and damages reduced;*

MEREDITH, J.A., *dissenting.*

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[MULOCK, C.J. Ex. D.]

RAINY LAKE RIVER BOOM CORPORATION V. RAINY RIVER  
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*Water and Watercourses—International Boundary Stream—Unlawful Erection of Sheer-Boom by United States Company in Canadian Waters—Booming and Sorting Logs of Canadian Lumber Company—Payment for Services—Implied Contract—Authority to Exact Tolls—Evidence—Onus—Ashburton Treaty—Jus Publicum—Act of State Legislature—Ultra Vires—Permit of United States War Department.*

The plaintiff company, incorporated under the laws of the State of Minnesota, by articles which purported to empower it to construct and maintain works on the Rainy River, to drive and sort logs passing through its booms, and to charge tolls for the services so rendered, constructed a portion of its works in 1889, and extended them in 1905, under a permit from the War Department of the Government of the United States. Piles were driven along the stream at places sometimes in the middle and at others near to but not in the middle of the stream, and booms connected by chains were secured in a continuous line along these piles up the stream, except where at one place towards the easterly end an opening for vessels was left; to the east of this opening was erected a sheer-boom, which ran in a north-easterly diagonal direction across and up the stream to the Canadian shore; at the lower or westerly end of the boom were cross-booms, sorting-gaps, and pockets, whereby logs could be held and sorted. The Rainy River runs between the Province of Ontario and the State of Minnesota, and under the Ashburton Treaty it is established as an international river, and its thalweg constitutes the boundary-line along its course between Canada and the United States. The defendant company in 1904 erected mills and booms on the northerly shore of the river, some distance below the westerly end of the plaintiff company's works, and in 1906 and 1907 conducted lumbering operations on its limits in the vicinity of Rainy Lake, watering its logs in common with those of other lumbermen, all of which, mixed together, floated down the lake and into the Rainy River. At this point, if uninterfered with, the logs would have distributed themselves over the whole river on their way down; but the plaintiff company's sheer-boom caused all the logs to pass to the south of and inside the main-boom, thereby preventing a substantial portion of them floating down in Canadian waters along the north side of the boom. The defendant company objected to the plaintiff company handling its logs; but the plaintiff company in the years 1906 and 1907, by means of its works, sorted and separated the logs passing into its sheer-boom, at least to some extent, and claimed payment for its services:—

*Held*, that the plaintiff company was not entitled to recover, upon the ground either of an implied contract, or of legal authority to maintain the works and to charge and collect reasonable tolls for services rendered.

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The sheer-boom, built wholly on the Canadian side of the boundary-line, had no legal authority for its existence. No legislation of a foreign power could entitle the plaintiff company to erect or maintain the sheer-boom, and by means of it to divert the property of a Canadian citizen from Canada into the United States, and there to cause it to pass into the custody and control of a foreign corporation. If a person wrongfully takes possession of a chattel of another, and, whilst in such possession, alters, improves, or otherwise deals with it, he is not entitled to payment for such services.

Even if the plaintiff company were otherwise entitled to recover for services in respect of logs lawfully in its possession, inasmuch as the confusion was caused by the unlawful acts of the plaintiff company, the onus was upon it to shew affirmatively the quantity of the defendant company's logs which lawfully came into its possession; there was no evidence from which this could be shewn; and, therefore, the plaintiff company could not recover.

In the absence of authority to exact tolls, or in the absence of a contract, express or implied, on the part of users of improvements on a highway to pay tolls, the person erecting such improvements has no right to exact tolls from the users. The principle is the same whether the public way be on the water or on the land; and here, in spite of the illegal works on the river, it remained *publici juris*.

The provision in the plaintiff company's charter purporting to entitle it to impose tolls or other charges was *ultra vires* the State Legislature and null and void; and nothing in the permit of the War Department authorised the imposition of tolls or other charges.

ACTION to recover certain sums of money from the defendant company for booming, sorting, rafting, and driving the defendant company's logs down the Rainy River during the years 1906 and 1907.

January 31, February 1, 2, 15, and April 27, 28, 29. The action was tried before MULOCK, C.J.Ex.D., without a jury, at Toronto.

G. F. Shepley, K.C., for the plaintiff company.

G. H. Watson, K.C., and *Strafford Watson*, for the defendant company.

September 11, 1912. MULOCK, C.J.:—It may be convenient to refer to the plaintiff company as the Boom company and to the defendant company as the Lumber company.

The Boom company was incorporated by articles of incorporation issued under the laws of the State of Minnesota and dated the 23rd February, 1889, which articles purported to empower the Boom company to construct and maintain booms and other works on the Rainy River, to drive and sort logs passing through its booms, and to charge tolls for the services so rendered. Thus authorised, the Boom company, in or about the year 1889, constructed a portion of its works. On the 27th February, 1905,

amending articles were issued declaring that the general nature of the Boom company's business should be "the improvement of the Rainy River from its mouth at the Lake of the Woods to the falls of said river at International Falls . . . by cleaning, deepening . . . the channel . . . and so keeping and maintaining said river and the said improvements and works in repair as to render driving logs and floating timber thereon reasonably practicable and certain, and to drive, tow, boom, assort, hold, distribute, and otherwise handle logs . . . in said river . . . and to collect tolls and charges for such services," etc.

On the 6th April, 1905, the War Department of the Government of the United States granted a permit to the Boom company to extend, and thereupon it did extend, its works easterly.

The general nature of these works may be described as follows. Piles were driven along the stream at places sometimes in the middle and at others near to but not in the middle of the stream, and booms connected by chains were secured in a continuous line along these piles up the stream, except where at one place towards the easterly end an opening was left for the purpose of enabling vessels to pass through. To the east of this opening was erected a sheer-boom, which ran in a north-easterly diagonal direction across and up the stream to the Canadian shore. At the lower or westerly end of the main boom were cross-booms, sorting-gaps, and pockets, whereby logs could be held and sorted.

The Lumber company is a corporation incorporated under the laws of the Province of Ontario, and carries on its lumbering business in that Province. Its saw-mills are situate in Ontario, on the northerly shore of the Rainy River, some distance below the westerly end of the Boom company's works, and the logs in question were cut on Canadian limits for the purpose of being manufactured into lumber at the Lumber company's mills in the said Province of Ontario. In connection with its mills, the Lumber company had also erected a boom, some two and a half miles in length, along the Rainy River, for the purpose of catching and securing its logs as they floated down the river. This boom was in existence and in effective condition in the years 1906 and 1907, and was then sufficient to enable the Lumber company to separate from the logs of other persons all its own logs as they floated down the river and to take proper care of them.

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The Rainy River commences at the foot of Rainy Lake, being separated therefrom by the International Falls, and flows westerly some eighty miles into the Lake of the Woods. Throughout its whole length it is a navigable river, floatable for logs from shore to shore, and is several hundred feet wide, with a current of from two to three miles an hour, and its floatable character was not improved by the Boom company's works.

A number of lumber companies, including the defendant company, conduct lumber operations on the upper waters tributary to the Rainy River, floating their cuts of logs down to their respective mills, situate along the river bank. Their practice is to cut logs in the winter and haul them on the ice. Then in the spring the logs mix together and float down the river towards the mills, each mill having certain boom accommodations of its own. One of these companies is the Rat Portage Lumber Company, which owns two mills; one situate higher up the river than are those of the defendant company and other of the mill-owners. Its other mill is at Kenora, at the foot of the Lake of the Woods. At the westerly end of the Boom company's boom it is necessary to separate the logs of the Rat Portage Lumber Company from those of the other owners operating lower down the river.

The Rat Portage Lumber Company controls the Boom company, and it would seem that the original object for which the latter's boom was constructed was to enable the Rat Portage Lumber Company to separate its logs from those of other companies.

The Rainy River runs between the Province of Ontario and the State of Minnesota, and under the Ashburton Treaty it is established as an international river, and its thalweg constitutes the boundary-line along its course between Canada and the United States.

The Lumber company erected its mills and booms in the year 1904, and in the years 1906 and 1907 continued lumbering operations on its limits in the vicinity of Rainy Lake, watering its logs in that lake and its tributaries, in common with the logs of other lumbermen, all of which, mixed together, floated down the lake, over the falls and into the Rainy River. At this point, if uninterfered with, the logs would have distributed themselves



over the whole river on their way down, although probably the greater proportion would have been carried by the current towards the southerly side of where is now the Boom company's boom, but the sheer-boom caused all the logs to pass to the south of and inside the main-boom, thereby preventing a substantial portion of them floating down (which they otherwise would have done) in Canadian waters along the north side of the boom. The Lumber company, being prepared to separate its logs from the rest, objected to the Boom company handling or in any way interfering with them. The Boom company, however, at the westerly end of its works, required to separate the logs of the Rat Portage Lumber Company from those of the other mill-owners, and did so by allowing, during the years 1906 and 1907, all the logs except those of the Rat Portage Company to pass unsorted through the sluiceways, each company, including the Lumber company, separating its logs from the others as they floated down the river, after having passed the westerly end of the plaintiff company's works. The Rat Portage Company's logs thus separated amounted to about one-third of the whole quantity, and the only service rendered to the Lumber company by the works and operations of the Boom company in respect of the logs of 1906 and 1907 was this separation of the Rat Portage Lumber Company's logs from the rest of the logs. There is no evidence shewing that the Boom company's works and operations benefited the Lumber company by preventing its logs of 1906 and 1907 coming to its works in undesirable quantities. There is a conflict of testimony as to whether the Boom company sorted the logs of 1906 and 1907 into separate pockets for the respective owners; but I accept Mr. Matthieu's evidence that the only sortation was in respect of the Rat Portage Lumber Company's logs. The extent, however, of the sortation does not determine the question of liability, but merely goes to that of the damages, if any, to which the Boom company may be entitled.

The Boom company rests its right to payment for whatever services it may have rendered to the Lumber company on two grounds: first, implied contract; and second, legal authority to maintain the works and to charge and collect reasonable tolls for services rendered.

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As to the first ground, Mr. Shepley's argument is, that, the Boom company having erected its works, the Lumber company, by allowing its logs to be mixed with those of other owners and to pass into the Boom company's works, rendered a separation necessary, and thus impliedly requested the Boom company to make that separation for reward. It is true that the Lumber company caused its logs to be deposited on the ice during the two winters in question. Other operators having acted similarly, the whole cut became mixed and required separation; but such action on the part of the Lumber company did not, I think, constitute an implied request to the Boom company to make that separation. The destination of the Lumber company's logs was its mills on the Rainy River. There it had erected booms, pockets, and other devices, whereby, if permitted to use the river uninterfered with and unaided by the plaintiff company's works, it could have separated and taken care of its own logs. All the witnesses agree that, having regard to rapids and other conditions above Rainy River, it was impossible to float the Lumber company's logs in cribs or in any other way than as separate single pieces. Unless, therefore, that method of floating was adopted, the Lumber company would have been unable to make use of its standing timber. Thus it was necessary to float its logs loose from the limits by the route pursued to the Rainy River. This necessity, and the fact that the Lumber company was deriving no benefit from the unauthorised interference of the Boom company with its logs on the way to the mill, and had forbidden it to interfere with them, negative the inference of an implied contract.

Mr. Shepley argued the case as if the Lumber company was solely responsible for the mixing of its logs with those of other owners, and, therefore, was liable to the other owners for the cost of unmixing. Such, however, is not this case. The mixing was the result of common action. If the Boom company had been one of the owners, it would have had to share the responsibility for such mixing; and its only right, I think, would have been to remove its property at its own expense; but, whether such be the law as between different owners, I fail to see how a stranger can step in, and, against the protest of an owner, meddle with his property, and then in his own name maintain

an action for such services. If, at the request of the Rat Portage or any other company, it performed any service, it may have a cause of action against such moving company, but not, on an implied contract, as against the present defendant company.

For these reasons, I am of opinion that the defendant company is not liable to the plaintiff company on any implied contract.

The other ground on which the Boom company rests its claim is, that it is legally entitled to maintain its works as a whole, including the sheer-boom, which is wholly within Canadian territory, and, by means of its works, to take and retain possession and control of the Lumber company's logs as they float down the stream and until they are caught by the cross-booms and sorted into pockets, and to charge the company for such service. The Lumber company denies the right of the Boom company to interfere with its logs or to payment for such services.

Much the same question as is involved here came before the Circuit Court of the State of Minnesota, and was there determined adversely to the Boom company, and that decision is pleaded in bar to the present action. By the treaty between Great Britain and the United States of the 9th August, 1842, commonly known as the Ashburton Treaty, the Rainy River is made part of the boundary-line between Canada and the United States, the treaty declaring that it "shall be free and open to the use of the subjects and citizens of both countries." The middle of the channel, or thalweg of the river, marks the line of separation between the two countries (Wheaton's Elements of International Law, 4th ed., p. 297), this treaty confirming the presumption of law that the right of navigation is common to them both.

The sheer-boom is a necessary and material part of the Boom company's works. Without it, a substantial portion of the logs in question would have floated down the river on the north side of the boom. This sheer-boom, however, diverted many (although what quantity cannot be determined) from their natural course into the Boom company's works. The sheer-boom, built wholly on the Canadian side of the dividing line between the two countries, has no legal authority for its exist-

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ence. No legislation of a foreign power could entitle the Boom company to erect or maintain this sheer-boom, and by means of it to divert the property of a Canadian citizen from Canada into the United States, and there to cause it to pass into the custody and control of a foreign corporation. Such was the practical effect of the maintenance of the sheer-boom, as regards a substantial portion of the logs in question. Thus the Boom company illegally acquired possession of a portion of the Lumber company's property, removed it from Canada, and now claims compensation for services in respect thereof. If a person wrongfully takes possession of a chattel property of another, and, whilst in such possession, alters, improves, or otherwise deals with it, he is not entitled to payment for such services: *Hiscox v. Greenwood* (1803), 4 Esp. 174; *Cheshire Railroad Co. v. Foster* (1871), 51 N.H. 490; *Purves v. Moltz* (1867), 5 Robertson (N.Y.) 653; *Silsbury v. McCoon* (1844), 6 Hill (N.Y.) 425; *Bryant v. Ware* (1849), 30 Me. 295.

The evidence shews that, without the sheer-boom, some of the Lumber company's logs would have floated down the river on the north side and others on the south side of the boom, but what proportion in each case is quite uncertain. The direction and velocity of the winds, the quantity of logs in the river at one time, also the proportions of the Lumber company's logs and other owners' logs then floating together, are all factors which would have affected the course taken by the logs. There is no evidence shewing to what extent these influences affected the direction taken by the Lumber company's logs in the seasons 1906 and 1907.

The Boom company claims at the rate of thirty-five cents per thousand feet, board measure, of logs of the Lumber company passing through its works during those years; but, even if entitled to payment at that or any other rate for such logs as, if uninterfered with, would have floated inside its works, it seems to me impossible to determine the proportion not affected by the wrongful action of the Boom company in taking possession of a portion of the Lumber company's logs by means of the sheer-boom. To do so, it would be necessary to deduct from the mixed mass of logs that passed through the boom of the company's works in the two years in question the



quantity of the Lumber company's logs wrongfully taken possession of by means of the sheer-boom. To say what that quantity was would be the merest guess-work. There is no reasonable evidence whereby to determine it.

Even if the Boom company were otherwise entitled to recover for services in respect of logs lawfully in its possession, inasmuch as the confusion was caused by its unlawful acts, the onus is upon it to shew affirmatively the quantity of the defendant company's logs which lawfully came into its possession. For reasons already given, there is no evidence from which this can be shewn; and, therefore, the Boom company cannot recover: *Warde v. Eyre* (1615), 2 Bulstr. 323; *Anon.* (1594), Poph. 38.

On another ground I think the plaintiff company's action must fail. All the works in question constituted one structure. It may have facilitated the flotation of logs; but, treated as a whole, it was in the river without legal authority. A bridge along a public road may be a necessity; but, if erected without legal authority, its mere construction does not authorise the person building it to exact tolls from the public, who in using the bridge are still exercising their right to travel, free of tolls, along the highway. In the absence of authority to exact tolls, or in the absence of a contract, express or implied, on the part of users of improvements on a highway to pay tolls, the person erecting such improvements has no right to exact tolls from such users. The principle is the same whether the public way be on the water or on the land. Here, in spite of the illegal works on the river, it remained *publici juris*.

As said in *Tanguay v. Price* (1906), 37 S.C.R. 657, 667: "The defendant's logs were lawfully in the river while on their way down, and until they were stopped by the plaintiff's barrier, and they continued to be lawfully there after they were stopped. . . . The service rendered to the defendant by the plaintiff's boom, although of great value, was involuntary and accidental, and could afford no ground of action."

Thus far I have dealt with the question in the view that the sheer-boom is an inseparable part of the Boom company's works; but, assuming that it is not, then the question is, can the plaintiff company recover in respect of the remainder of the

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works? The main-boom, beginning at the west end of the gap below the sheer-boom, extends westerly down the river some two and a half miles, when it reaches the catch booms, pockets, etc.

I accept the evidence of Euclid I. Bourgois as to the position of this main-boom in its relation to the thalweg, and find that the easterly one-half mile of this main-boom is wholly within Canadian territory, its easterly end being three hundred and ten feet north of the thalweg, and it being at the point marked "2" on exhibit 17 (being a point about half a mile further westerly), three hundred and forty feet north of the thalweg.

This portion of the main-boom, like the sheer-boom, is unlawfully in the river. If it and the sheer-boom had not existed, it is reasonable to suppose that many more logs would have passed down the river on the Canadian side of the boom. Witnesses speak of the logs coming over the falls, at times, in quantities sufficient to cover the river from bank to bank.

There was some opinion evidence as to what proportion of logs was diverted by the sheer-boom inside the plaintiff company's works, but it is valueless, there being no reliable data from which to form such opinion; there is an entire absence of evidence as to the effect of the illegal half mile of boom structure.

What I have said in respect of the legal consequence of the existence of the sheer-boom applies also to the case of the unlawful half mile of main-boom.

But, apart from the question whether the works of the plaintiff company, in whole or in part, are lawfully in the river, it is to be observed that the right to erect and maintain them is quite different from the right to collect tolls, which is the only issue involved in this action. The defendant company is asking no relief, but simply resisting a money claim. The works may or may not improve the navigability of the river; they may or may not be lawfully there; but, so far as the defence is concerned, the sole question is, whether the plaintiff company is entitled to recover money damages in respect of the defendant company's logs which passed through the works in the years 1906 and 1907.

The legislation of the State of Minnesota is the only legislative authority upon which the plaintiff company relies as

authorising it to impose tolls. Had the State Legislature power to grant such authority?

Under the Ashburton Treaty, the citizens of the two countries became entitled to the free use of the river. The Legislature of the State of Minnesota has purported to deprive them of that right by granting permission to the plaintiff company to exact tolls. The undisputed evidence is, that the State Legislature had no jurisdiction so to repeal that clause in the treaty.

I, therefore, think that the provision in the plaintiff company's charter purporting to entitle it to impose tolls or other charges is *ultra vires* the State Legislature and null and void. The permit granted by the War Department does not assist the plaintiff company; it merely sanctions an extension of its works, subject to the condition that "the company shall not exact tolls or charges for the passage of logs or rafts or other forms of navigation."

Mr. Shepley sought to shew that this condition was void. It is not, however, necessary to determine that point; but it is sufficient to say that nothing in the permit authorises the imposition of tolls or other charges.

I, therefore, think that the plaintiff company has no legislative authority to exact tolls or other charges.

Notwithstanding the existence of the plaintiff company's works, the navigation of the river for all purposes remains free to each citizen of the two countries, unless he shall by contract, express or implied, deprive himself of such right.

The defendant company has not so deprived itself; and, therefore, the plaintiff company is not entitled to maintain this action, which is dismissed with costs.

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[BOYD, C.]

CAMPBELL V. TAXICABS VERRALS LIMITED.

*Company—Action against—Absence of Organisation—Legal Existence by  
Virtue of Letters Patent—Companies Act—Authority of Solicitors to  
Defend Action—Powers of Directors—Costs.*

The defendant, sued as a company, had been legally constituted a company by letters patent of Ontario dated the 27th October, 1910; but no steps were taken to organise it. A taxicab business was conducted under the company's name; but, so far as appeared, vehicles sent out

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in response to calls on the company were owned by V., who was one of the directors named in the charter. The plaintiff was injured by reason of the negligence of the driver of a taxicab called by the plaintiff from the garage ostensibly owned by the defendant; and the plaintiff sued the defendant for damages. The writ of summons was served upon V., and the action was defended, at the instance of V., by solicitors instructed by an indemnity company. The solicitors had no knowledge of the defects or omissions in the organisation of the company. The plaintiff recovered a judgment against the defendant; but, finding no assets to realise upon, moved to set aside the appearance and all subsequent proceedings, and for an order against the solicitors for payment of the plaintiff's costs, upon the ground that the defendant was non-existent. After the charter issued, nothing was done by the shareholders or directors until about the time of the application, when a meeting of the directors was held, and they ratified what had been done in defending the action:—

*Held*, that the charter had not become forfeited under the Companies Act by reason of the inaction; that the company was an existing legal entity, though with unused powers; that the directors had power to defend the action in the name of the company; that neither the company nor the plaintiff could raise any objection to the authority of the solicitors; and the application was dismissed.

Sections 16, 17, 18, and 21 of the Companies Act, 7 Edw. VII. ch. 34 (O.), considered.

*Simmons v. Liberal Opinion Limited, In re Dunn*, [1911], 1 K.B. 966, distinguished.

MOTION by the plaintiff for an order setting aside an appearance entered in the name of the defendant as a company, and all subsequent proceedings, and directing the solicitors who entered the appearance and defended the action to pay the plaintiff's costs, upon the grounds that the defendant never authorised the defence, and had never been organised as a company, and had never appointed officers, and had never appointed any person to accept service, and had given no instructions to the solicitors to defend.

The action was for damages for injuries sustained by the plaintiff on or about the 9th November, 1910, by reason of the negligence of the driver of a taxicab engaged by the plaintiff from the defendant's garage. The plaintiff recovered judgment against the defendant; but found no assets to realise upon.

September 18. The motion was heard by BOYD, C., in the Weekly Court at Toronto.

*J. MacGregor*, for the plaintiff.

*J. M. Godfrey*, for the defendant and the solicitors who defended the action.

September 19. BOYD, C.:—This motion was launched on the authority of *Simmons v. Liberal Opinion Limited, In re Dunn*,



[1911] 1 K.B. 966, the head-note of which suffices to shew its scope: "A solicitor assuming to act for one of the parties to an action warrants his authority, and is personally liable to the opposing party for costs, if it turns out that the client for whom he assumed to act is non-existing, or has revoked the authority." The defendant in that case was sued as a company; it turned out that, though some preliminary steps had been taken to form, the matter had not been consummated by registration, so that in fact there was no company—it was non-existent. That is the radical difference as compared with this case, where the defendant, sued as a company, had been legally constituted a company by letters patent of Ontario dated the 27th October, 1910. No steps appear to have been taken to organise the company in the usual way; and, after the charter issued, so matters remained till lately, when a meeting was held, and the directors ratified what had been done in defending this action. The charter has not become forfeited under any of the provisions of the Companies Act by reason of its inaction.

So far as appears, the vehicles which are sent out in response to calls made by telephone on the "Taxicabs Verrals" are owned by George Verral. The writ was served upon him, and he forwarded it to an indemnity company in the United States, and that company undertook the defence, and instructed the solicitors who are now called upon by this motion to pay all the costs of litigation. There is nothing to shew that these solicitors had any knowledge of the defects or omissions in the organisation of the defendant, which are now relied on as nullifying the conduct and the results of this action: a very different position from that occupied by the solicitor in the English case. At most, or at least, in this instance, there is a defendant which has a legal entity, with unused powers it may be, but still other than a non-existent body. The statute under which the defendant was incorporated declares (sec. 16) that notice of incorporation shall be given by the Provincial Secretary in the Ontario Gazette, and the corporation shall be deemed to be existing from the date of the letters patent incorporating the same (7 Edw. VII. ch. 34, O.) Upon incorporation, the corporation is in possession of the powers specified in the Act (see secs. 17, 18, etc.). Section 21 declares that if a corporation does not go into actual operation

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within two years after incorporation or for two consecutive years does not use its corporate powers, the powers, except as far as is necessary for the winding-up of the corporation, shall be forfeited—but that forfeiture shall not prejudicially affect the rights of creditors.

This company, being incorporated on the 27th October, 1910, had not defaulted under this lapse of time when the action was begun or when this application was made. It was an existing body, in possession of unused powers, and with its original directorate holding office (see secs. 79 and 85). The directors, of whom George Verral was one, had power to defend this action in the name of the company (Lindley on Companies, 6th ed., vol. 1, p. 378); and the solicitors had no knowledge or intimation that this was not a *bonâ fide* defence. That the company had no property is nothing to the purpose of this application. Many an action against a company is frustrated for want of assets after judgment has been obtained.

The solicitors having appeared for the company, and the suit having been contested down to judgment, it does not appear relevant to inquire in what manner the solicitors were appointed; the company cannot raise any objection to their authority, nor can the plaintiff: *Faviell v. Eastern Counties R.W. Co.* (1848), 2 Ex. 344, and *Thames Haven Dock and R.W. Co. v. Hall* (1843), 5 M. & Gr. 274.

I do not further pursue this inquiry; I see no ground to interfere with the record or to order payment of costs of the action by the solicitors.

The application is dismissed, with costs to be set off against the costs taxed to the plaintiff in the action.

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[IN CHAMBERS]

# RE BAYNES CARRIAGE CO.

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*Company—Winding-up—Petition for—Evidence in Support—Examination of Directors—Dominion Winding-up Act, secs. 134, 135—Practice of High Court—Con. Rules 489, 491, 492.*

In support of a petition for an order for the winding-up of a company under the Dominion Winding-up Act, R.S.C. 1906, ch. 144, it is competent for the petitioner to examine witnesses; and the directors of the company may be so examined.

No rules having been made under sec. 134 of the Act, sec. 135 introduces the practice of the High Court of Justice, as found in Con. Rules 489, 491, 492.

*Re Belding Lumber Co. Limited* (1911), 23 O.L.R. 255, specially referred to.

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MOTION on behalf of the company and certain of the directors to set aside an appointment to examine the directors, and the subpoena to testify, therewith served, on the ground that it was not competent for the petitioners to use such evidence on an application for a winding-up order under the Dominion Act.

September 19. The motion was heard by BOYD, C., in Chambers.

*H. A. Burbidge*, for the applicants.

*Grayson Smith*, for the petitioners.

September 20. BOYD, C.:—The petitioners are shareholders to the extent of \$50,000 paid-up shares, the total capital being \$375,000. The broad position taken is, that the procedure under the Consolidated Rules is not available under the Act. It is also urged that directors as officers cannot be so examined. As I read the Act (R.S.C. 1906, ch. 144), it makes no express provision as to this preliminary procedure except what is found in sec. 13, *i.e.*, the application is to be by petition, of which four days' notice is to be given to the company before the application is made. No provision appears as to how the petition is to be supported or verified. It seems to be that it is only by reference to secs. 134 and 135 that the *modus operandi* can be ascertained.

Sections 107 to 133 are headed "Procedure," but they apply generally to proceedings under a winding-up order, that is, after it has been made, and not to this preliminary application for such an order. Section 116 is the only one which relates in terms to a step before the winding-up order is made, and that is of a conservatory character. Sections 134 and 135 relate to "Rules, Regulations, and Forms." Section 134 provides for the Judges making "forms, rules, and regulations," to be followed and observed in proceedings under the Act, but no action has been taken in this direction; so that sec. 135 now controls the situation applicable to the present motion. It reads: "Until such forms, rules, and regulations are made, the various forms and procedures . . . shall, unless otherwise specifically provided, be

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the same as nearly as may be as those of the Court in other cases." No other special provision has been pointed out to me, nor do I know of any, which derogates from this sweeping direction as to the method of procedure. I read the word used, "procedures," as including rules and regulations and methods of practice current in the High Court of Justice (sec. 2 (e)), which are to be adapted as nearly as may be to the uses of the profession under the Winding-up Act. The marginal gloss is not of authority, but it is correct as found opposite sec. 135, to wit, "Until rules are made, procedure of Court to apply." The practice of the Court is to support petitions by affidavits or by *vivâ voce* evidence of witnesses under the Consolidated Rules in that behalf, 489, 491, 492. Substantially the very matter now in dispute was decided as I now decide in earlier cases; see *Re Belding Lumber Co. Limited* (1911), 23 O.L.R. 255.

I see no reason why the directors should not be examined as witnesses. They know more about the internal affairs of the concern than any other, or should have such knowledge, and the shareholders should not be deprived of this source of information when no imputation of *mala fides* exists. The policy of our legal methods is to facilitate and to simplify proceedings, and English cases in other conditions cannot control what is the manifest intention of the law-makers as set forth in the Winding-up Act.

All I now decide is, that it is competent for the petitioners to examine the directors, and the procedure taken is right.

The application must be dismissed with costs.

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## [IN THE COURT OF APPEAL.]

## RE SOLICITORS.

*Solicitors—Taxation of Costs against Clients—Charges not Included in Tariff—Value of Services—Question of Fact—Evidence—Decision of Taxing Officer—Right of Court to Review—Appeal—Services of Solicitors as Directors of Company—Entries in Solicitors' Dockets—Increase in Items in Preparing Bills—Absence of Explanation—Payment by Commission—Broker's Charges—Costs of Taxation—Excessive Charges—Retaxation.*

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Bills of costs were rendered by the solicitors to clients in respect of services in and about the incorporation of a company, sale of its bonds, preparation of mortgages to secure bondholders, acting as directors of the company incorporated, etc. The bills were rendered at about \$25,000; and, upon reference to the Senior Taxing Officer, were allowed at about half that sum. In making up the bills, the solicitors did not adhere to the charges previously made in their dockets, but increased the amounts. Upon appeal and cross-appeal to a Judge, the taxation was affirmed. Upon a further appeal and cross-appeal to a Divisional Court, a variation was made in favour of the solicitors upon one point. The clients then appealed to the Court of Appeal, and the solicitors cross-appealed:—

*Held*, that, as the items complained of by the clients were not tariff items, the remuneration of the solicitors could be based only upon the value of their services, which was a question of fact to be determined by the Taxing Officer, upon proper evidence; and his conclusion thereon was open to review by the Court—the rule that the Court will not interfere with the Taxing Officer's discretion as to the amount of a taxable item in a bill of costs having no application in such a case.

2. That the solicitors were not entitled to be paid by their clients for their services as directors of the company.
3. That the Court should not interfere with the Taxing Officer's discretion as to the costs of the taxation.
4. *Per* GARROW, J.A., that the entries in the solicitors' dockets, while not conclusive, ought to be at least *prima facie* evidence of what the correct charges should be; and *per* MEREDITH, J.A., that the entries were not necessarily binding upon the solicitors; though, as against them, they were entitled to great weight, needing satisfactory explanation before treating them as mistakes in the way of undercharge; and no such explanation was given.
5. *Per* MEREDITH, J.A., that there was no justification for imputing to the clients a promise to pay by way of commission; and, short of a contract to pay, no such charge could lawfully be sustained. If in the conduct of a client's business a broker's services are needed, it is the solicitor's duty, with the client's assent, to have the work done by a competent broker.
6. *Per* CURLIAM, that the bills were excessive, and should be referred back to the Taxing Officer for retaxation of the items complained of by the clients.

APPEALS by the clients, B. C. Beach, C. A. Beach, Beach Brothers, and the Cobalt Power Company Limited, and cross-appeals by the solicitors, from the certificate of Mr. J. H. Thom, Senior Taxing Officer of the Supreme Court of Judicature for Ontario, upon the taxation of bills of costs of the solicitors rendered to the clients.

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May 1, 1911. The appeals and cross-appeals were heard by  
BRITTON, J., in the Weekly Court at Toronto

*R. A. Pringle*, K.C., for the clients.

*F. E. Hodgins*, K.C., for the solicitors.

June 29, 1911. BRITTON, J.:—The history of the proceedings for which the bills of costs in question were rendered is fully given in the statements and papers filed. I have had the benefit practically of an argument in writing, part of it being the statements at length and in full detail of Mr. Kilmer and of Mr. McAndrew (two members of the solicitors' firm). Mr. Pringle, also, for the clients, has submitted in writing his view of the facts and of the law applicable.

The bills were rendered as separate bills against Beach *et al.* and against the company. The proceedings necessarily ran into each other or overlapped. Much of the time of the solicitors was occupied for both Beach *et al.* and for the Cobalt Power Company. The work was important and difficult, and required a great deal of care and attention and professional skill of a high order; but the bills must necessarily be considered as a whole, and as growing out of work done practically in the same matter. The solicitors were employed as such. They were not employed as brokers or promoters. They were employed generally by Beach *et al.*, and the interests of Beach *et al.* and the Cobalt Power Company were not conflicting but identical; and whatever changes were necessary in the capitalisation or organisation of the company were those required by the solicitors, who were the solicitors for Beach *et al.*

Mr. McAndrew mentions the date of the first work of his firm in this matter as about the 18th February, 1909. Mr. Pringle states that the entire time taken in the work, other than that of a trifling character, was about one hundred and fifty days. That would not necessarily prevent the solicitors from getting a larger amount than that allowed; but time occupied is one of the factors necessary to know in determining the proper amount to allow. The work was confined to comparatively narrow limits as to time, and the clients had the benefit of the work being done expeditiously. In looking at the matter as a whole, as a matter in which Beach and the company were at

one as a client of the solicitors, the amount of fees as taxed seems large and would be so considered by the majority of clients, even of the wealthy class, and in these days of large transactions. The bill against Beach *et al.* as individuals was ren-

dered at.....	\$15,907.07
And there was disallowed.....	9,234.12

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Leaving it taxed at.....	\$ 6,672.95
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The bill against the Cobalt Power Company was ren-

dered at.....	\$ 9,193.67
There was disallowed.....	3,126.70

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And allowed at .....	\$ 6,066.97
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So that the entire amount of the solicitors' costs as allowed is \$12,739.92. This amount the clients think unreasonably large. The solicitors say the amount is unreasonably small, and that certain items, struck off by the Taxing Officer, should not have been disallowed—hence these appeals.

These bills are not "solicitors' bills," within the ordinary meaning of these words; nor are they "solicitors' bills" within the meaning of the statute. The clients appreciated that, and so on this appeal argued that the solicitors should be compelled to furnish further particulars, details, and items, shewing the work for which large sums were charged. It is not in accordance with the practice, if in my power, at this stage and as to this kind of bills, to order further particulars, or to order new bills to be delivered.

The order for taxation was made on the 17th November, 1910, by the Master in Chambers, upon the application of the individual clients; and the clients submitted to pay what, if anything, should be found due to the solicitors, upon the taxation of these bills. These bills, which had then been delivered, were referred to the Taxing Officer; and the bill which the solicitors had delivered to the Cobalt Power Company should also be taxed by the Taxing Officer, but the latter without prejudice to any rights which the solicitors may have against the said Cobalt Power Company. The Taxing Officer, however, refers to

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a præcipe order dated the 21st September, 1910, as his authority for taxing the bill against the Cobalt Power Company, and rendered to that company. Both bills were in fact taxed, and all parties were represented. It is not now a case of new bills—it is simply taxation of present bills rendered.

I have looked at every item in these bills, and have considered the evidence and arguments in support of and in objection to the items under review. There has been no error in principle on the part of the taxing officer. It is in every case only a question of amount.

*Re Solicitor* (1908), 12 O.W.R. 1074, is binding upon me. In that case the authorities are cited, and the conclusion reached that “where the Taxing Officer has not made any mistake in principle, and where the amount is not so grossly large or small (as the case may be) as to be beyond all question improper, the Court” ought not to “interfere with the discretion of the Taxing Officer.” That case, unless and until reversed, is binding upon me.

In *Murphy v. Corry* (1906), 7 O.W.R. 363, cited upon the argument, Mr. Scott, then Master at Ottawa, discusses the whole question of such bills as these are, and of the rules and principles to govern on such taxation.

For the above reasons, and without referring to any other of the many cases cited, I must dismiss the clients’ appeals. I do not interfere with the discretion of the Taxing Officer in dealing with costs of taxation, and I do not allow any costs of these appeals. They will be dismissed without costs.

The appeal by the solicitors is: (1) against the disallowance by the Taxing Officer of a commission by way of remuneration for services in negotiating and completing a sale of stock and bonds of the Cobalt Power Company for \$180,000; and (2) in not allowing to the solicitors, as against Beach Brothers, remuneration for the services of the solicitors as directors and officers of the said company. What I have said in regard to the whole matter seems to me a sufficient answer to both grounds of this appeal. The Taxing Officer acted upon a proper principle in dealing with the solicitors and the costs as upon *quantum meruit*.

If the solicitors intended to make a charge of five per cent. or any other large sum by way of commission, the clients were



entitled to know of it, so that they could at least have endeavoured to separate what may be called the financial part of the business from that which is generally understood to be the work of solicitor and counsel—the difficult work of organisation and steering corporations away from the troubles into which so many fall. It may be accepted, as the solicitors allege, that solicitors are entitled to receive the same remuneration as could be recovered by any person not a solicitor for the same services. It is not the case, however, that a solicitor, employed as such, and doing special work in connection with a company or undertaking and charging for that work, can, at the end, when the undertaking is to be sold, or when bonds are issued and sold, as the result of all the work of solicitor and client and for which the client has paid the solicitor, charge a commission, adding it as “rounding out” the bill of costs. The evidence taken as a whole does not establish that in this case five per cent. was only reasonable.

The claim for remuneration for the services as directors and officers of the company by members of the firm of solicitors should not be allowed. If such services should be paid for at all, payment should be by the company, and only with the consent of the shareholders. When these services as directors, etc., were rendered, they were rendered as part of the whole work being carried on by Beach Brothers and the solicitors, and it was not in contemplation of Beach Brothers that any special and separate charge for these services by solicitors, *quâ* directors and officers, should be made, over and above the day-by-day work being charged, as shewn by the bills.

The entries in the solicitors’ dockets do not estop the solicitors from claiming larger amounts than those mentioned, but they confirm my opinion that the bills should not be increased beyond what the Taxing Officer has allowed.

The appeal of the solicitors should be dismissed—but, as in the other cases, without costs.

The clients and the solicitors both appealed from the order of BRITTON, J.

October 31, 1911. The appeals were heard by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., RIDDELL and LATCHFORD, JJ.

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*R. A. Pringle, K.C., for the clients.*

*F. E. Hodgins, K.C., for the solicitors.*

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November 3, 1911. RIDDELL, J.:—Messrs. Beach Brothers were lessees from the Crown of a water power at Hound Chutes, and had entered into an arrangement with the firm of Baillie & Co., looking to the development of this water power.

The Cobalt Electric Power Company Limited had been chartered to carry out this arrangement, Beach Brothers being the owners of the stock in fact, and the incorporation of the company being for technical reasons. On the 18th February, 1909, the solicitors were retained by B. C. Beach, for Beach Brothers; and they subsequently, at the request of their clients, became directors of the company.

The arrangement with Baillie & Co. fell through, and the bonds of the company, to the amount of \$180,000, were sold to Mr. D. Fasken.

The clients, Beach Brothers, procured an order, on the 26th October, 1910, for the delivery of bills of costs, charges, and disbursements, and bills were rendered accordingly against Beach Brothers and the company separately. An order was obtained for taxation on the 17th November, 1910, and the taxation proceeded before Mr. J. H. Thom, Taxing Officer, on the 6th December, 1910. The result was:—

Against Beach Brothers, rendered at.....	\$15,907.07
Taxed off.....	9,234.12
Allowed at.....	\$ 6,673.95
Against the company, rendered at.....	\$ 9,193.67
Taxed off.....	3,126.70
Allowed at.....	\$ 6,066.97

Upon the taxation it was agreed that the whole be dealt with as a bill against Beach Brothers, as the amount would come out of their pocket in any case.

An appeal and cross-appeal were dismissed by my brother Britton.

Both parties now appeal to this Court, the clients having failed to obtain an order allowing an appeal direct to the Court

of Appeal (2 O.W.N. 1495), although the solicitors did not object to such order.

The appeal, as argued before us, covers six points:—

(1) A charge is made of \$2,000 for the preparation of a trust mortgage, etc., to secure bonds to the amount of \$300,000 and the mortgage bonds—this is allowed by Mr. Thom at \$1,500, but the clients contend that \$700 to \$750 is ample.

(2) A similar charge of \$4,000 in respect of \$600,000 and afterwards \$800,000 bonds; allowed at \$2,000; the clients contend that \$1,250 is ample.

(3) Items 1 to 27 charged at \$500, allowed at \$350; the clients are willing to allow only \$235.25.

(4) Items 28 to 62 charged at \$9,000; allowed at \$2,700; the clients would allow \$965.

This is also to be considered as No. 7, being the first point of the cross-appeal.

(5) A charge of \$600, which the clients say should only be \$338.12.

(6) A charge of \$5,000, allowed at \$2,549.98, which the clients do not admit.

Nos. 3, 5, and 6 are really pressed because the dockets of the solicitors are said to contain entries with amounts to the sum the clients desire the costs should be reduced to; but this is not exactly the case, and many entries are not full. I can find nothing in the way of an estoppel, even if the contention of the clients as to the dockets were well founded—the solicitors are entitled to a reasonable sum for their services, no matter what their dockets do or do not shew.

As to Nos. 1, 2, and 4, while the Taxing Officer might have been justified in reducing the amounts allowed, I can see nothing in which he has erred in principle.

It cannot be necessary to elaborate authorities for the rule to be followed on an appeal from the Taxing Officer. I adhere to the opinion expressed in *Re Solicitor*, 12 O.W.R. 1074: "The Court must necessarily possess a general jurisdiction over the Taxing Officer on all matters to prevent any positive wrong to parties or suitors;" but we can give "no countenance to the proposition that where the Taxing Officer has not made any mistake in principle, and the sum awarded is not so grossly large

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or small (as the case may be) as to be beyond all question improper, the Court can interfere with the discretion of the Taxing Officer." It is much the same case as when a motion is made to the Court against a finding at the trial—the Court, no doubt, has the power to set aside the finding, but it will not do so unless the finding is "beyond all question improper."

I may add that I can see no excess in the amounts allowed on any of the items. They should as to Nos. 1, 2, and 4 be increased, if anything. It cannot be unknown to any one that the value of money had decreased and is decreasing—the same amount of money cannot command the same amount of services or of goods as formerly.

The appeal should be dismissed. In the cross-appeal are two matters for consideration:—

(7) The solicitors were instructed to sell \$180,000 worth of bonds, which they did; they claim five per cent., *i.e.*, \$9,000, and have been allowed \$2,700. The argument is, substantially, that they were employed by Beach Brothers as brokers, and should be paid the same amount as brokers would charge as brokerage or commission. Now, it is undoubtedly true that a person who happens to be a solicitor may be employed as a broker, just as he may be employed as an auctioneer or a gardener; but it is equally true that what these solicitors were employed to do is what is done by solicitors every day for their clients. The present case on the facts comes within Lord Langdale's test in *Allen v. Aldridge, In re Ward* (1844), 5 Beav. 401, and the business was "business in which the . . . solicitor was employed, because he was a . . . solicitor, or in which he would not have been employed, if . . . the relation of . . . solicitor and client had not subsisted between him and his employer:" see p. 405.

*In re Baker Lees & Co.*, [1903] 1 K.B. 189, is a late instance of the application of the principle that in such cases the fees to be paid are solicitors' fees, and so are taxable.

The solicitors in the present case are not to be paid as brokers, but as solicitors.

There is no hard and fast rule as to the remuneration to be allowed for such services—it may be on a percentage basis, as was the case in *In re Richardson* (1870), 3 Ch. Ch. R. 144, or



a lump sum, as in *Re Solicitor*, 12 O.W.R. 1074. I adhere to the view expressed in the latter case that "in . . . proceedings taken by persons who indeed are solicitors, but who do not act differently or with any different right from those not solicitors, I cannot see why they should not be paid the same as any other person." But all that is for the Taxing Officer; so long as he does not err in principle, speaking generally, the Court on appeal will not interfere. It cannot be said that there is any error in the principles upon which the Taxing Officer proceeded in this item; he is an officer of very great and varied experience, and we should not interfere. This the more that the learned Judge appealed from has affirmed the Taxing Officer.

(8) The solicitors, at the instance and in the interests of Beach Brothers, became and acted as directors, etc., of the company. There is and can be no pretence that there was any impropriety in this, or that there was any conflict of duty to client and company—the client "owned" the company, which, indeed, as has been said, was formed for technical reasons.

This was work done for the client; and, while there would be difficulty in the solicitors compelling the company to pay them, I can see none in the way of charging the clients Beach Brothers. The Taxing Officer thus reports: "The said solicitors claimed an allowance for services performed by them and members of their office staff in acting as directors and officers of the Cobalt Power Company Limited, at the request of and in the interests of the said Beach Brothers; but that I did not consider the said claim, and made no allowance therefor." In this I think he was wrong. I am unable to follow my brother Britton when he says: "If such services should be paid for at all, payment should be made by the company." The services, while they were in form rendered for the company, were in fact rendered for Beach Brothers, and as part of the whole work carried on for Beach Brothers. The appeal should be allowed on this ground.

If both parties agree, we may fix a reasonable sum to allow; but, if they cannot agree (say, within ten days), the matter should be referred back upon this point—costs of the new reference to be in the discretion of the Taxing Officer. The costs of this appeal should substantially follow the event—the clients

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should pay three-fourths of the costs before us; and we should not interfere with the costs before Mr. Justice Britton.

FALCONBRIDGE, C.J.:—I agree.

LATCHFORD, J.:—I agree in the result.

*Order accordingly.*

The clients appealed to the Court of Appeal from the order of the Divisional Court, and the solicitors cross-appealed.

May 9 and 10, 1912. The appeals were heard by GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A., and LENNOX, J.

*R. A. Pringle*, K.C., for the clients. The bills of costs, as thus far allowed, are grossly excessive, even if much has been taxed off the original amounts. There is nothing like this in Scott's Bills of Costs, 10th ed. The responsibility of the solicitors in respect of the two mortgages, for which such a large fee was allowed, was not great, as they were acting only for the mortgagors. Their charges in many instances exceed the amounts which their dockets shew; this, though not conclusive, is *prima facie* evidence of what they should receive unless satisfactory explanation were given that the docket entries were undercharges. This was not shewn here. On the main question, this is not a case of a mere mistake in *quantum* by the Taxing Officer, but a mistake in principle. This case does not come under the regular tariff, and so the rule against interfering with the Taxing Officer's discretion does not apply. Where the matter is outside the tariff, as here, the solicitor should get the value of his services, which should be determined by the Taxing Officer on evidence, not on his own knowledge. Therefore, the taxation should be re-opened for the admission of evidence of the value of the services. I do not find any case just like this, but refer to the following: *Re R. L. Johnston, a Solicitor* (1901), 3 O.L.R. 1; *Re McBrady and O'Connor, Solicitors* (1899), 19 P.R. 37; *Murphy v. Corry*, 7 O.W.R. 363; Am. & Eng. Encyc. of Law, 2nd ed., vol. 3, p. 420; *Re Tilleard* (1863), 32 Beav. 476; *In re A. B., a Solicitor* (1871), 8 U.C.L.J.N.S. 21. The solicitors should not have been allowed a fee for their services as directors. There was no express contract to pay them as such, and none

should be implied: *Re Mimico Sewer Pipe and Brick Manufacturing Co., Pearson's Case* (1895), 26 O.R. 289; Scott's Bills of Costs, 10th ed., pp. 509 to 584. No claim for commission should be allowed, as it was never contemplated by the parties, and at any rate was not a proper charge in the circumstances.

*F. E. Hodgins*, K.C., for the solicitors. The bills, as so far allowed, are fair and reasonable. In the taxation of these bills, the Taxing Officer did not err in principle, and the question of *quantum* alone arises on this appeal, and on that question the Taxing Officer's discretion should govern: *In the Estate of Ogilvie, Ogilvie v. Massey*, [1910] P. 243. The clients chose the Taxing Officer for their tribunal; they did not call as witnesses the experts who, they say, would have agreed with their contentions. The case of *Re Russell Son and Scott* (1886), 55 L.T.R. 71, explains *Re Tilleard, supra*, cited on behalf of the appellants. The solicitors are not bound by the entries in their dockets: *In re Hellard & Bewes*, [1896] 2 Ch. 229. There was a great deal of responsibility assumed by the solicitors. The clients would have lost all they had but for the loan of \$180,000 from Fasken, which was obtained through the influence of the solicitors: *Re Solicitors* (1907), 10 O.W.R. 951; *Re Solicitor*, 12 O.W.R. 1074. The solicitors are entitled to a commission: *In re Baker Lees & Co.*, [1903] 1 K.B. 189; *Gradwell v. Aitchison* (1893), 10 Times L.R. 20; *In re Richardson*, 3 Ch. Ch. R. 144; *In re Attorneys, etc.* (1876), 26 C.P. 495; *O'Connor v. Gemmill* (1899), 26 A.R. 27; *Paradis v. Bossé* (1892), 21 S.C.R. 419; *In re Harrison* (1886), 33 Ch.D. 52; *In re Macgowan, Macgowan v. Murray*, [1891] 1 Ch. 105, at p. 114; *Rice v. Galbraith* (1912), 26 O.L.R. 43. The solicitors are entitled to remuneration for services as directors, under an implied contract: *In re Dover Coalfield Extension Limited*, [1908] 1 Ch. 65; *Greenwell v. Porter*, [1902] 1 Ch. 530; *In re South Western of Venezuela (Barquisimeto) R.W. Co.*, [1902] 1 Ch. 701.

*Pringle*, in reply. In regard to commission, the solicitors should have employed a broker to do a broker's business. As to the clients seeking the tribunal, they had to go to Mr. Thom. The clients should have got the costs of the taxation, as they taxed off three-fifths of the whole.

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September 27. GARROW, J. A.:—As will be seen, the Divisional Court reversed the judgment of Britton, J., in part, upon the cross-appeal, and allowed the items charged by the solicitors for attendance as directors and officers of the Cobalt Power Company Limited. Riddell, J., in his judgment, says of this item: "This was work done for the client; and, while there would be difficulty in the solicitors compelling the company to pay them, I can see none in the way of charging the clients Beach Brothers."

The view of Britton, J., is thus expressed: "When these services as directors, etc., were rendered, they were rendered as part of the whole work being carried on by Beach Brothers and the solicitors, and it was not in contemplation of Beach Brothers that any special and separate charge for these services by solicitors, *quâ* directors and officers, should be made, over and above the day-by-day work being charged as shewn by the bills."

It would, I think, be dangerous to encourage the idea that, under any circumstances, a solicitor acting for a client may as such become a director upon the board, or act as an officer of, a joint stock company, and be at the same time in the pay of the client for the services so rendered to the company.

Whether or not the company is what is called a one-man company can make no difference in the principle. Such a company is an entity, and is subject to the general law respecting joint stock companies, the policy of which seems to be entirely against such a practice. The rule, or, as it might perhaps better be called, the presumption, in the case of directors, is, that the services as director are to be gratuitous. See *per* Bowen, L.J., in *Hutton v. West Cork R.W. Co.* (1883), 23 Ch.D. 654, at p. 672. Although, of course, by observing the formalities prescribed by the statute, provision may lawfully be made for payment. See the Ontario Companies Act, 1912, secs. 89, 90.

There is certainly no evidence of an express promise to pay for these services; and I agree with Britton, J., in thinking that the circumstances do not justify the necessary inference of an implied promise by the clients; for which reason I agree with Britton, J., that the item should not be allowed, and that the judgment of the Divisional Court should, to that extent at least, be reversed.

Then as to the main question. The clients contend that,



notwithstanding the large amount already taxed off, the bills are still grossly excessive in several particulars—a contention so far not acceded to either by Britton, J., or in the Divisional Court. The contention is, therefore, one, under the circumstances, not easy to maintain in this Court. None of the members of this Court nor of any of the Courts who have passed upon the matter can or will pretend to either the knowledge or experience of the learned Senior Taxing Officer, universally acknowledged to be an exceptionally capable and competent official. And, if the matter could properly be regarded, as it evidently was, both by Britton, J., and in the Divisional Court, as not involving any principle, but merely a question of amount—in other words, of “more or less” under some stated or acknowledged principle—I for one would not think of interfering. Britton, J., in his judgment, said: “*Re Solicitor*, 12 O.W.R. 1074, is binding upon me. In that case the authorities are cited, and the conclusion reached that ‘where the Taxing Officer has not made any mistake in principle, and where the amount is not so grossly large or small (as the case may be) as to be beyond all question improper, the Court’ ought not to ‘interfere with the discretion of the Taxing Officer.’” Riddell, J., in delivering the judgment of the Divisional Court, refers to the same case, which was a judgment of his own, and used practically the same language. And the language itself correctly expresses what, after looking at a number of cases upon the subject, seems to me to be the law in such cases. But what I cannot understand is the “principle” which both the learned Judges seem so satisfied is not being violated, and that, therefore, the whole question is one of amount. I could understand the use of the term as applied to items governed by an authorised tariff; but it is conceded that the items complained of are not tariff items; and the only principle applicable to them, so far as I am aware, is, that the solicitor shall recover the value of his services—in other words, he shall recover as upon a *quantum meruit*. What the value of the services is, is a question of fact, to be determined, as in other cases, by proper evidence, which means, of course, here, the evidence of experts of experience, the Taxing Officer being, of course, at liberty freely to apply his own special knowledge and experience in addition. And his result or conclusion in such a case must, on

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principle, be just as open to review as that of any other judicial officer dealing with a question of fact, just as, for instance, an assessment of damages by a Judge at a trial without a jury; for it would certainly be odd and not reassuring to the public that, while this Court may, as it constantly is called upon to do, review the findings of a trial Judge, or even of a Divisional Court, upon a question of the *quantum* of damages, it is powerless to act in such a case as this.

There does not appear to have been a large amount of evidence given before the learned Taxing Officer, and what was given does not seem to me to be very definite or conclusive. In the argument before us reference was made to other experienced gentlemen familiar with the class of work in question who might have been, but were not, called. And there must, we would think, be no dearth of such evidence.

Upon the whole, I have come to the conclusion, reluctantly I admit, that the clients are entitled to have the taxation at least partially re-opened, for the purpose of shewing, if they can, that the bills in question should be still further reduced. The amounts, even as allowed, are certainly very large. They greatly exceed the amounts as entered in the solicitors' dockets, which, while not conclusive, ought to be at least *primâ facie* evidence of what the correct charges should be. The whole account need not, of course, be gone into, but only those items of which the clients still complain, which are all, I think, set out in the judgment of Riddell, J. Both parties as to these will be at liberty to call further evidence, and the clients will take the risk in costs, if in the end they fail to obtain a further reduction.

It is a pity that there is no proper tariff for such charges. It places all parties in a very awkward position. That there is power to fix such a tariff, see the Solicitors Act, 1912, secs. 46, 47. And it may be worth while to note the various clauses (a) to (e) of the latter section, as to what should guide in framing such a tariff, these being indirectly some guide, even in the absence of a tariff or until one is provided.

We were asked to interfere with the order heretofore made as to costs by the Taxing Officer. The clients might very well, under the circumstances, have been given their costs, considering

the very large amount struck off the bills; but it was, I think, a matter within the discretion of the Taxing Officer, with which we ought not to interfere.

As to the other costs, if the parties had produced before the Taxing Officer the evidence which, I think, might have been obtained, we should have been able to deal with the whole matter here. For that omission both parties are, it seems to me, somewhat to blame. We are reversing the result in the Divisional Court, in so far as concerns the solicitors' cross-appeal; but, on the other hand, are not allowing the clients' appeal otherwise than by a reference back to the Taxing Officer—in other words, giving them another opportunity on further evidence still further to reduce the bills, if they can; so that the final result is still uncertain.

Conditions such as these lead me to think that a fair order as to costs is to direct that the order of Britton, J., as to the costs of the proceedings before him, should stand, and that there should be no costs to either party of the appeal or cross-appeal to the Divisional Court or to this Court. The costs upon the reference back will, of course, be in the discretion of the Taxing Officer.

LENNOX, J., agreed with GARROW, J. A.

MEREDITH, J.A.:—The rule that an appeal does not generally lie from a Taxing Officer to a Judge as to the amount of a taxable item comprised in a bill of costs, has no application to such a case as this: the rule deals with ordinary matters of taxation, with which the Taxing Officer, from experience, ought to be better able to deal than a Judge; if he be not, the remedy should be in a better Taxing Officer; because, but for the rule, a Judge would, by appeals, be made really a Taxing Officer. The items involved in this case are of a very extraordinary amount—a \$25,000 bill in a single matter; the character of the work has not been of ordinary occurrence in the past, and it seems to me to be quite time that the views of the highest Court of the Province should be expressed so as to be, to some extent, a guide in a new but apparently growing class of work.

The starting points in considering the case now may very

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well be these three: the amount of the solicitors' claim against the clients, (1) as particularly set out by them, both as to services rendered and charges made for them, at their own instance; (2) as greatly increased in these demands for the purposes of the taxation; and (3) as taxed by the Taxing Officer.

The amounts charged by the solicitors in their books, from time to time as the services charged for were performed, are not, of course, necessarily binding upon them; though, as against them, they are entitled to great weight, needing satisfactory explanation before treating them as mistakes in the way of undercharge; and no such explanation was given; indeed, there seems to me to have been no reason for the increase except that the solicitors wanted more when the clients wanted explanation. To the contrary, after a careful examination of the original entries, I have no hesitation in saying that the charges made in them are, to say the least of it, very liberal, and such as any solicitor might well be satisfied with; and the increases made for the purpose of the taxation extravagant.

Two of the main items upon which the solicitors' extremely large ultimate demand was made, consist of the two mortgages prepared for the purpose of securing bonds to be issued, and much was attempted to be made of them, especially on account of the responsibility the solicitors, it was said, incurred in respect of them; but, under any circumstances, as the solicitors were acting for the mortgagors only, what great responsibility could they be incurring? It would be very different with solicitors who were acting for the bondholders. And, beside this, the first mortgage was not finally used; the second one was substituted for it; and the second one was prepared in accordance with a form provided by a solicitor, who was acting for the proposed bondholders, and who required that it be in that form. I can find no good reason for allowing any great amounts in connection with either of these mortgages.

Nor can I find any good reason for allowing the solicitors anything by way of a "commission." Such a charge is entirely an afterthought; it was not thought of when the work was undertaken, when it was done, or when it was charged for; it is not ordinarily, if at all—except under Rules of Court made for the purpose of curtailing solicitors' charges—a proper solicitors'



charge. One going to a broker and retaining his services in matters pertaining to his business, impliedly, if not expressly, undertakes to pay the usual brokerage charges, because that is the usual, if not the invariable, mode of dealing; but in this case neither solicitor or client had any thought of any such method of payment; it was not the usual manner of charging, or paying, in that profession: the usual and proper method of charging was that adopted by the solicitors, evidenced by the entries in their dockets. If in the conduct of a client's business a broker's services are needed, I desire to say that it is the solicitor's duty, with the client's assent, to have the work done by a competent broker. To do the work himself and charge for it four or five times as much as the experienced man—the broker—would charge, would be inexcusable. I can find no justification for imputing to the clients a promise to pay, in any respect, by way of commission; and, short of a contract to pay, no such charge can lawfully be sustained. Nor, if charges by way of commission were incidents of a solicitor's business, can I find evidence enough in this case to warrant any such charge: the loan or advance by the witness Fasken was not obtained by the solicitors independently of the clients, nor was that moneyed man first introduced to the clients by the solicitors, nor can I believe that the solicitors' "personality," and not the security of the clients' property and the money to be made out of the transaction, opened the purse-strings, or, indeed, had anything substantial to do with that profitable operation.

In dealing with bills of costs for services such as those in question here, the allowances to be made must be reasonable; and, in determining what is reasonable, the Taxing Officers have a safe guide in the authorised tariff of fees under which bills of costs are daily taxed; it affords evidence of reasonableness in so many things that I cannot but think it should afford a reasonable guide in most, if not in all, things.

I would allow the appeal and do not oppose a retaxation—if the solicitors are yet unwilling to accept the charges made by them in their own books, which the applicants are willing to pay, and which appear to me to be quite large enough.

The question of costs of this appeal and of former appeals has now been raised, and I have been asked to express my opinion

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upon it. When writing the foregoing opinion nothing was expressed upon the subject, because I saw no reason to depart from the just rule that a successful party should have his costs of an appeal. Here the clients' appeal is allowed and the solicitors' cross-appeal is dismissed. What possible reason can there then be for making an exception of, and a special order as to, costs in this case? Because the unsuccessful parties happen to be solicitors is no kind of reasonable or just reason. The clients were obliged to come to this Court to get relief from the judgment of a Divisional Court, and they have got it; the solicitors were not obliged to appeal from that judgment, which gave them too much; but they did, and failed. Why not pay costs of such an appeal? My conclusions upon the merits of the appeal do not necessitate a reference back of the bills; I would prefer dealing with them finally now; but see no serious objection to such a reference. It is, however, in my opinion, no ground whatever for depriving the clients of their costs in this Court. If this appeal were allowed and the cross-appeal dismissed and the judgment of the single Judge restored merely, no one would gainsay the clients' right to such costs; why, then, should they fare worse when getting greater relief than that; and in any case why be deprived of them merely because this Court may deem it better to refer the matter back to the Taxing Officer than finally dispose of the case on its merits on this appeal? The costs of the appeals to the single Judge and of the appeals to the Divisional Court stand upon a different footing: the former appeal and cross-appeal failed, and the Judge exercised his discretion over the costs of them: there was also failure to a considerable extent on each side ultimately as to the things sought in the appeals to the Divisional Court. So that a fair disposition of the costs of the appeals in each of those Courts would be made in leaving the parties respectively to pay their own costs; and that disposition of such costs I would now make. The costs of the new taxation should be dealt with by the Taxing Officer.

MACLAREN and MAGEE, JJ.A., agreed in the result.

The order of the Court was as follows: Appeal allowed with costs and cross-appeal dismissed with costs; no costs to either party of the appeals to BRITTON, J., and the Divisional Court; reference back to the Taxing Officer.

## [IN THE COURT OF APPEAL.]

## MARTIN V. GRAND TRUNK R.W. Co.

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*Master and Servant—Injury to Servant—Negligence of Fellow-servant in Lower Grade of Employment—Liability of Master—Workmen's Compensation for Injuries Act, sec. 3, sub-sec. 5—Construction—Railway—“Person in Charge or Control of Engine”—Evidence—Findings of Jury.*

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Sub-section 5 of sec. 3 of the Workmen's Compensation for Injuries Act, R.S.O. 1897, ch. 160, should receive a liberal construction in the interests of the workman.

Sept. 27

An employer may be responsible for the negligence of an employee resulting in injury to another employee, although the one injured is in authority over the other.

The plaintiff was foreman of a railway yard of the defendants, and M. was his assistant and subject to his orders. In carrying out the plaintiff's orders, M. gave a wrong direction to the driver of the yard-engine, by reason of which the plaintiff was struck by the engine and injured. The engine-driver testified that he took his instructions from M.:—

*Held* (LENNOX, J., dissenting), that there was reasonable evidence that M. was, on the occasion in question, a person in charge or control of the engine, within the meaning of sub-sec. 5; and, upon the findings of the jury (set out below), in an action to recover damages for the plaintiff's injury, the defendants were responsible for the negligence of M.

Judgment of MÜLOCK, C.J.Ex.D., affirmed.

ACTION for damages by reason of injury sustained by the plaintiff whilst in the service of the defendant company.

October 5, 1911. The action was tried before MÜLOCK, C.J.Ex.D., and a jury, at Brantford.

*W. S. Brewster*, K.C., for the plaintiff.

*I. F. Hellmuth*, K.C., and *W. E. Foster*, for the defendants.

December 11, 1911. MÜLOCK, C.J.:—The plaintiff was, at the time of the accident, yard-foreman of the defendant company's railway yard at the city of Brantford, and as such foreman it was his duty to control the movements of trains within the yard. McNaughton was his assistant and subject to his orders.

On the morning of the 16th October, 1910, the plaintiff and McNaughton were on duty. A loaded car was standing on Ryerson's siding, and the plaintiff required this car to be moved to the south side of the yard. The south side of the yard is a place lying to the south of all the railway tracks at this station. In the yard are a number of tracks running easterly and westerly; two of them are main line tracks, the southerly one being the east-bound main line track, and the one lying immediately to the north of it being the west-bound main line track. North of

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this track are a number of sidings, the most northerly one being called Ryerson's siding, which runs in a southerly direction. To carry out the plaintiff's order to McNaughton, to place this car at the south side of the yard, it was necessary to move the car easterly on Ryerson's siding until it reached a point where it could be switched on to the east-bound main line. Then it would proceed by the east-bound main line westerly until it reached a siding called "the south lead," which led off the east-bound main line in a southerly direction to the place indicated by the plaintiff, viz., the south side of the yard.

Having given McNaughton the order, the plaintiff proceeded westerly along the west-bound main line for the purpose of stopping trains from the west until the car had taken the south lead, and thus was clear of the east-bound main line; and, whilst thus walking westerly, he was overtaken and struck by the engine which was pulling the car, causing the injury complained of in this action.

The following are the questions submitted to the jury with the answers:—

1. Q. Were the defendants guilty of negligence causing the accident? A. Yes.

2. Q. If so, in what did such negligence consist? A. Mr. McNaughton failing to carry out his orders from the plaintiff Martin.

3. Q. Was McNaughton competent for the position he filled as yard-helper? A. No.

4. Q. Was the accident caused by reason of the negligence of any person in the service of the defendants who had any superintendence intrusted to him, whilst in the service of such superintendence? A. Yes.

5. Q. If your answer is "yes," who was the person and what was the negligence? A. (a) Mr. McNaughton; (b) in not carrying out his instructions from the plaintiff in taking the west-bound track instead of the east-bound track.

6. Q. Was the accident caused by the negligence of any person in the service of the defendants who had the charge or control of any locomotive or engine upon the defendants' railway? A. Yes.



7. Q. If your answer is "yes," who was such person? A. Mr. McNaughton.

8. Q. Could the plaintiff, by the exercise of reasonable care, have avoided the accident? A. No.

9. Q. At what sum do you assess the damages? A. Common law, \$4,000; Workmen's Compensation Act, \$2,600.

McNaughton being a fellow-workman, the plaintiff cannot recover at common law; but the case comes, I think, within the provisions of both sub-secs. 2 and 5 of sec. 3 of the Workmen's Compensation for Injuries Act.

For the work then in hand McNaughton was in superintendence over the engineer who controlled the movement of the engine. This brings the case under sub-sec. 2. For the like purpose, McNaughton had charge or control of the points or switch whereby the engine could take the proper track, and also had control (through the engineer, a servant under him) of the engine, which brings the case within sub-sec. 5.

In *Gibbs v. Great Western R.W. Co.* (1883), 11 Q.B.D. 22, affirmed in appeal (1884), 12 Q.B.D. 208, which was an action against a railway company for injury caused by negligence of a man alleged by the plaintiff to have charge of the points of a railway, Field, J., dealing with the section of the English Act which in its general language corresponds with sub-sec. 5, says that it "provides that the common master shall be liable for the negligence of the particular persons who have charge—that is, who have the directing hand to carry out the general instructions of the master—with respect to specified things."

On receiving the plaintiff's order, McNaughton proceeded to carry it out. He got on the foot-board of the engine and directed the engineer to move the car easterly. On reaching a certain point, the engine and car stopped in order to proceed westerly, when McNaughton turned the switch; but, instead of setting it for the east-bound main line, he made a mistake, setting it for the west-bound main line, along which the engine proceeded, overtook the plaintiff and injured him.

The defendant company is, I think, liable under the statute for McNaughton's negligence, unless the plaintiff has been guilty of contributory negligence.

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For the defence it was argued that the plaintiff by walking between the two tracks would have escaped injury. He had no reason to suppose that the engine would come along the northerly track, which, therefore, was, in his judgment, a place where he might safely be. The only danger that he supposed it necessary to guard against was from the engine, which he expected on the southerly track. Thus, in his opinion, he was safer when walking along the northerly track than along the space between the two tracks. The jury have found him not guilty of contributory negligence, and there is ample evidence, in my opinion, to support this view. I see no common law liability.

The judgment will, therefore, be entered for the plaintiff for \$2,600, with costs of action.

The defendants (by consent of the plaintiff) appealed directly to the Court of Appeal from the judgment of MULOCK, C.J.

May 3, 1912. The appeal was heard by MOSS, C.J.O., GARROW, MACLAREN, and MAGEE, JJ.A., and LENNOX, J.

*I. F. Hellmuth*, K.C., and *W. E. Foster*, for the defendants, argued that the trial Judge erred in finding that the defendants were under liability by reason of any negligence of McNaughton, who was not a person having any superintendence intrusted to him, within the meaning of the Act, but was a fellow-workman of the plaintiff, in a lower grade than he was; and the accident happened while he was carrying out the alleged orders of the plaintiff. The negligence, if any existed, was not such as is contemplated by the Act, nor was it the negligence of a person in charge or control of any points upon the defendants' railway. *Gibbs v. Great Western R.W. Co.*, 11 Q.B.D. 22, affirmed 12 Q.B.D. 208, does not bear out the view that McNaughton was in charge of the engine, and is an authority in favour of the defendants. As to his being in control of the points, the jury has made no finding. Reference was made to *Warren v. Macdonnell* (1908), 12 O.W.R. 493.

*W. S. Brewster*, K.C., for the plaintiff, argued that the judgment appealed from was justified by the law and the evidence, and that McNaughton was in charge or control of the locomotive, and of the points, in such a way as to make him a person intrusted with superintendence, and exercising such superintendence, as

regarded the plaintiff. He referred to *McCord v. Cammell & Co.*, [1896] A.C. 57, *per* Lord Halsbury, L.C., at p. 63; *Toronto R.W. Co. v. Snell* (1901), 31 S.C.R. 241.

*Hellmuth*, in reply, argued that no case can be found in which the negligence of a subordinate has made the employer liable for an accident to his principal under the Act.

September 27. GARROW, J.A.:—The action was brought by the plaintiff to recover damages from the defendants, said to have been caused to him by the negligence of one John McNaughton.

The plaintiff and McNaughton were both in the employment of the defendants: the former as yard-foreman at the city of Brantford, and the latter as his helper. Early on the morning of the 16th October, 1910, the plaintiff, while engaged upon his duties in the yard, was struck and severely injured by an engine which was being used for shunting purposes. The collision was, it is said, brought about by the negligence of McNaughton in carrying out a shunting order given by the plaintiff, by taking the engine along the west-bound track instead of the east-bound track. The plaintiff, after the order, assumed that the engine which was following behind him would proceed on the east-bound track, and, in consequence, was walking forward so near the west-bound track that he was struck by the buffer of the engine.

The evidence shewed that the portion of the yard which it was desired to reach could be reached by both tracks, but that the east track was much the more direct, and in fact the only natural one to use on the occasion in question.

The order given to McNaughton by the plaintiff was verbal, and was called to him from a distance. It must now, however, be assumed that the order was heard and was understood by McNaughton, who, although apparently available, was not called as a witness. No question, apparently, was raised at the trial concerning the sufficiency of the order or as to McNaughton's understanding of it. McNaughton accompanied the engineer upon the engine, and personally, without any further order or instruction from any one, opened the switch to admit the engine upon the wrong track, where afterwards the mischief was done.

There were allegations of incompetence on the part of McNaughton and also of contributory negligence on the part of the plaintiff.

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A motion for a nonsuit was denied by the learned Chief Justice; and the case was submitted to the jury, who, in answer to questions, found as follows (as set out in the judgment of MULOCK, C.J., *supra*).

Judgment for \$2,600 was afterwards directed to be entered in favour of the plaintiff; the learned Chief Justice being of the opinion that the plaintiff was not entitled to recover as at common law, but was entitled, under sub-secs. 2 and 5 of sec. 3 of the Workmen's Compensation for Injuries Act, to judgment for the amount found by the jury.

Nothing, I think, turns upon the alleged incapacity of McNaughton. Indeed, the sole point in the case—as counsel upon the argument admitted—is: Are the defendants responsible, under the circumstances, for the negligence of McNaughton in sending the engine along the wrong track?

That responsibility must, I think, rest, if at all, upon an affirmative answer to the further question: Was he—or, rather, is there reasonable evidence that he was—on the occasion in question, a person in charge or control of the engine, within the meaning of sub-sec. 5 of sec. 3 of the Workmen's Compensation for Injuries Act?

That sub-section, it has been said, should receive a liberal construction in the interests of the workman.

In *Gibbs v. Great Western R.W. Co.*, 12 Q.B.D. 208, at p. 210, Lord Coleridge, C.J., said: "I entirely agree that it would not be proper for the Court to give a narrow construction to an Act of Parliament which was intended to do away with what many persons felt to be rather a blot on the law." And in the same case, Brett, M.R., at p. 211, says: "The Act of Parliament having been passed for the benefit of workmen, I think it is the duty of the Court not to construe it strictly as against workmen, but in furtherance of the benefit which it was intended by Parliament should be given to them, and therefore as largely as reason enables one to construe it in their favour and for the furtherance of the object of the Act."

In *McCord v. Cammell & Co.*, [1896] A.C. 57, a similar view was taken in the House of Lords—Lord Halsbury, at p. 63, saying: "I cannot help thinking that the Legislature meant in a very wide way to protect workmen who are engaged in such dangerous



employments, and they said, as an exception to the ordinary rule of law, that if the person in charge of a locomotive or of a train shall be guilty of negligence, then, quite apart from any question of superiority of employment, and quite apart from the necessity of superintendence, the employer may be liable."

And, bearing in mind the authoritative views upon the question of construction thus expressed—in which I hope it is not presumptuous to say that I entirely agree—I am of the opinion that there was in this case such reasonable evidence.

The question is not one merely of superintendence in the ordinary sense, nor of physical control of the mere mechanism of the engine, but rather the question, who, in the course of his duties and employment, had, at the time, the direction and control of its movements upon the tracks? And that that person was McNaughton the evidence leaves little room to doubt. The engineer, Robert Hay, who had been in charge of the yard-engine operating under the direction of the plaintiff as yard-foreman, with the assistance of McNaughton as his helper, for two weeks before the accident—and who was, therefore, familiar with the mode of carrying on the work—said, in answer to questions by his Lordship:—

"His Lordship: Q. In operating your yard-engine, do you take instructions from McNaughton? A. Yes, sir, if he gives them to me. Sometimes the yard-foreman gives the instructions to him, and he delivers them to me.

"Q. And, if McNaughton gives you instructions how to move your engine, it is your duty to obey his instructions? A. It is my duty to take his signals, or to go where I am told, as long as I am going right.

"Q. Was McNaughton on that engine with you? A. He was on the foot-board of the engine.

"Q. Who, in fact, opened the switch to let you in on the west-bound track? A. McNaughton, I think.

"Q. And you took the track he turned you in on? A. Yes, sir.

"Q. If he had turned you in on the east-bound track, would you have taken it? A. I would have had to have taken to the east-bound.

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"Did he give you any verbal instructions? A. No, sir, not that I am aware of.

"Q. You simply ran your engine as directed by McNaughton? A. Yes, sir.

"Q. Then you place the responsibility upon him for the route you took on that occasion? A. Oh, yes.

"Q. You were just working the engine, and he was selecting the track? A. Yes.

"Q. So that you yourself were not governed by the signal Martin gave? A. No.

"Q. So that, in fact, whatever you did, you did, as you assumed, in compliance with McNaughton's orders? A. Yes."

In the face of such plain uncontradicted evidence, it seems idle to say, as is said by the defendants, that McNaughton was a mere messenger, having no power or control over the movements of the engine.

All, however, that we have to decide is, that there was here some reasonable evidence proper for the jury upon which to base their sixth and seventh findings; and, as I have said before, in my opinion there was.

The appeal should, in my view, be dismissed with costs.

MOSS, C.J.O., and MACLAREN and MAGEE, JJ.A., concurred.

LENNOX, J. (dissenting):—Taking the finding of the jury that the injury complained of resulted from the negligence of John McNaughton, a yard-helper working under the plaintiff as his assistant or as one of his assistants, are the defendants liable to the plaintiff under the Workmen's Compensation for Injuries Act, R.S.O. 1897, ch. 160?

At the time of the accident, the plaintiff was the yard-foreman on night duty; that is, he was the person intrusted by the company with the superintendence, charge, and control of the operation of shifting and shunting cars and making up trains in the Brantford yard; a position undoubtedly requiring, amongst other qualifications, experience, discretion, promptness, judgment, and the like. He was selected because of his supposed fitness; and he is the class of servant for whose negligence, whilst acting within the scope of his employment, the company is responsible to his

fellow-servants. No other servant can usurp his functions, and thereby create or enlarge the company's liability. The foreman cannot, of course, through want of care, want of instruction, imperfect or careless instruction, or otherwise, effectually commit to the chance action of a subordinate the superintendence, charge, or control mentioned in the statute; and to attempt to do this would be an attempted delegation of the worst kind.

The jury find that the accident was caused by the negligence of McNaughton, a person who had superintendence intrusted to him, whilst in the exercise of such superintendence. There is no evidence whatever that the company intrusted McNaughton with superintendence of any kind. It is not even pretended that the company empowered him to initiate anything; to exercise judgment or discretion, to decide anything, or to take independent action of any kind. He was a workman, to do what he was directed to do by the plaintiff; and, whenever he stepped outside this line, intentionally or otherwise, he was not acting for the defendants. He was not, as a matter of fact, intrusted with superintendence by the defendants; and he could not be intrusted with superintendence by the plaintiff. It follows from this, also, that in moving the switches in question McNaughton was not acting in the exercise of superintendence, within the meaning of sub-sec. 2 of sec. 3.

There was, therefore, no evidence to support the answers to questions 4 and 5.

Questions 6 and 7 are framed with reference to sub-sec. 5 of sec. 3, which provides for the responsibility of the employer where the injury is caused "by reason of the negligence of any person in the service of the employer who has the charge or control of any points, signal, locomotive, engine, machine or train upon any railway, tramway or street railway."

The jury were asked only as to a locomotive or engine, and they find that McNaughton had the charge or control of a locomotive upon the defendants' railway. The plaintiff admittedly was the person appointed by the defendants to have the mental charge and control of the operations of the yard; that is to say, he was from time to time to determine what should be done and to do it or direct the doing of it. Others might be called on to execute the work. He had helpers, but no deputies.

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The person in immediate physical control of the engine that night was Hay, the engineer. Immediately preceding the accident, McNaughton was the person who had actual physical control of the switch leading from the north to the west-bound track; but there was no finding as to any "points," "signal," or "machine"—the only terms which could be argued to embrace a switch. But, waiving this, does the statute mean mere physical control? *Gibbs v. Great Western R.W. Co.*, 11 Q.B.D. 22, 12 Q.B.D. 208, shews that it does not.

The provisions of the English Employers' Liability Act, on the questions here involved, are practically identical with our Act. In the *Gibbs* case, Fisher was the cause of the accident. His duties were to clean, adjust, oil, and repair at various places on the defendants' line of railway. He was subject to the order of an inspector, Saunders, who was responsible for the condition of the works. The work of Fisher was executed in the absence of the inspector; and Fisher negligently failed to replace a certain cover which he had removed in the course of his work. It was held by the unanimous decisions of the Divisional Court and Court of Appeal that there was no evidence for the jury that Fisher had "charge or control" of the points, within the meaning of the Act. Field, J., said (11 Q.B.D. at p. 26) that the Act "provides that the common master shall be liable for the negligence of the particular persons who have charge—that is, who have the directing hand to carry out the general instructions of the master—with respect to specified things. I am of opinion that there was no sufficient evidence upon which the jury could properly find that Fisher had charge of the points within the Act." In the Court of Appeal, the defendants were not called upon. During the argument, Brett, M.R., said (12 Q.B.D. at p. 209): "According to the evidence called for the plaintiffs, Fisher worked under Saunders. How can he therefore be the person who had the charge of the locking apparatus or points? It is not enough that he should say he had the charge. It must be shewn that his duties were such as that he should have the charge of the points within the meaning of the enactment." Lord Coleridge said (p. 210): "Then had he (Fisher) the charge or control of any points? He certainly had to do something from time to time to the machinery connected with the points, but he himself said



he worked under the direction of Saunders, and Saunders was called and he proved, I think, that he was the person who had apparently both the charge and the control of the points, and that Fisher was only a workman under him, and was not a person who had either the charge or the control of any points connected with the railway. . . . Here, as my brother Mathew put it in the Court below . . . Fisher, who acted under the orders of the person who had the charge and control of these points, was held by the jury to be a person who had the charge and control of the points himself. To hold this, would be to extend the words of the Act of Parliament."

The Master of the Rolls and Bowen, L.J., in deciding that the plaintiff could not recover, both put their judgment distinctly upon the ground that, although Fisher had to do his work from time to time in the absence of Saunders, yet, as he had no independent power of action—as he was controlled and directed by Saunders—he could not be said to be in charge or control at any time. The following sentences from the judgment of the Master of the Rolls are exceedingly pertinent (p. 212): "Now I cannot think that there is any colour for saying he (Fisher) had the control of the points, and the only question is whether he is a person who had the charge of them within the meaning of the statute. I think that to be such a person he should be one who has the general charge of the points, and not one who merely has the charge of them at some particular moment. Now what evidence is there that Fisher was a person who had such general charge? It is true that he himself said he had the charge, but to act upon such evidence would be to make him the judge of the law not the witness of facts."

Again, the plaintiff did not cease to be the person in charge and control by merely going to another part of the yard whilst operations which he had directed, or in substitution of what he had directed, were being performed. This was the primary ground taken by Lords Herschell, Macnaghten, Morris, Shand, and Davey, for holding the defendants liable in the case of *McCord v. Cammell & Co.*, [1896] A.C. 57, viz., that, although the engineer had uncoupled the train and gone away with the engine, and the negligent act was performed by the fireman in his absence, yet

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the engineer must, in contemplation of law, be held to be still in charge of the train.

I am, therefore, of opinion that there was no evidence proper to be submitted to the jury in support of the answers to questions 6 and 7.

If I am right in the foregoing conclusions, they dispose of the plaintiff's case; but, in any event, whatever may have been the scope of his employment, at the threshold of this inquiry is the question, was there any evidence at all to be submitted to the jury of negligence on the part of McNaughton causing the injury? I do not think there was. The negligence found by the jury is failure to carry out the plaintiff's instruction. Failure to hear or failure to understand is not negligence.

The plaintiff says that he "hollered" to McNaughton to bring the engine over to the south side of the yard, that he pointed with his thumb to the south side, and that McNaughton held up his hand to signal that he understood. It is, perhaps, clear that McNaughton did not do what the plaintiff intended, or, rather, all that he intended him to do; but, upon the vital question as to whether McNaughton heard what was called out and saw the plaintiff pointing with his thumb, or that any signal was given indicating a definite specific destination, there is no evidence at all. True, the plaintiff swears that McNaughton understood, for he threw up his hand. But understood what? Understood that he was to do something—was to make a movement of some kind. The plaintiff called out and pointed at the same time. The holding up of the hand as an answer is utterly indefinite. It would evidence comprehension if it repeated the signal or if the words used were repeated. Here the answer is the same answer, whatever the direction to be taken; and it may either have meant that he saw *and* heard or that he saw *or* heard; with the manifest contingency that he may not have heard aright.

Did he hear at all? The engine was moving; and, although Hay saw the thumb movement, neither Hay nor the fireman, both on the same engine with McNaughton, heard a word. With McNaughton sitting in the court-room with his lips sealed—in the absence of any evidence whatever pro or con—is it to be inferred, is it in effect to be taken as a presumption of law, that McNaughton must have heard, and heard correctly? It is not

enough that he thought he heard, or thought he understood, and acted in error. At best, the alleged verbal direction was indefinite and misleading. The engine was on the north side of the yard. The plaintiff said, "Bring it to the south side;" but he wanted it taken down the south lead. That was a definite point, equally easy to express. Why didn't he say so? And the west-bound track is on the south side of the yard, too, though not at the extreme south.

Then as to the so-called signal, used indiscriminately—as Hay and Graham swear, and the plaintiff by silence admits, although he was subsequently in the witness-box—a signal which Hay, experienced in the plaintiff's methods, interpreted just as McNaughton did. Can it be said to be some evidence of McNaughton's negligence because, on a momentary view of a man's thumb, held up at a distance of a hundred feet, he failed accurately to discriminate between two lines of track running in the same general direction, parallelling each other at a distance of ten feet apart?

One other circumstance I must refer to. The evidence stops short of shewing that McNaughton failed at all. Doing exactly what the plaintiff intended him to do, his first duty was to open the west-bound track and let the engine in on it. He did that. His next duty was to restore the west-bound track by turning the rails back to their former position: I think they call it "throwing the switch." He did that. His next act *would be* to pass the engine, go east of George street, open the switch, let the engine out from the west-bound track, restore the track, and so on until he got to the east-bound track. But is there any evidence that when he performed the second act he suspended operations and gave the signal to go west? No. On the contrary, Hay swears that McNaughton gave no signal; and the inference is irresistible that Hay, having interpreted the plaintiff's signal to run around the yard, as he says—and as he states he had often done before—immediately moved west when the switch was thrown. *Non constat*, McNaughton would have taken Hay to the east-bound track had he waited; but, as to leaving the question to the jury, the point is, that there is no evidence at all.

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These, then, are grounds for the dismissal of the action, and, if there was nothing more, with costs. But, to my mind, the trial was unsatisfactory, and the plaintiff should be granted a new trial if he desires it. Having a new trial in view, it is not well to discuss minutely the evidence suggesting it. Questions 6 and 7 would appear to be framed rather on the idea of the negligence of Hay than of McNaughton. It is enough to say that, in my judgment, there was evidence upon which a jury could reasonably find that Hay was negligent and that his negligence was the immediate cause of the accident. Whatever may have been the circumstances when he began to move west on the west-bound track, at all events before he had proceeded far, and in ample time to prevent difficulty, he knew, by seeing the plaintiff turn the switch to the south lead, that that was where he was expected to go, and that the plaintiff would not be expecting him on the west-bound track. Seeing the plaintiff proceeding on the south instead of the north of this track would confirm this. He did nothing; he let the plaintiff pass out of sight, with the result that the plaintiff was run down.

With a finding that Hay was negligent, the plaintiff would not, perhaps, be confronted with the breaks in the evidence or the difficulties of construction—hereinbefore discussed. When the emergency presented itself, and continuously thereafter until the injury occurred, Hay was a person in charge and control of a locomotive. The minds of the jury were not directed to this view of the case. I know that the plaintiff said that he did not claim that Hay was negligent. That does not matter at all. He is a witness to facts, not a judge of the law. The same must be said of some of Hay's answers to the learned trial Judge.

I think that there should be a new trial, if the plaintiff desires it, and decides upon it within two weeks; and that, in that event, the costs of the former trial and of the appeal should be left for the decision of the trial Judge.

In the event of the plaintiff not desiring a new trial, the action should be dismissed without costs.

*Appeal dismissed; LENNOX, J., dissenting.*



## [IN THE COURT OF APPEAL.]

## RE MACDONALD AND CITY OF TORONTO.

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Sept. 27

*Municipal Corporations—Expropriation of Land for Widening of Street—  
“Due Compensation”—Municipal Act, 1903, sec. 437—Arbitration and  
Award—Value of Land Taken—Injurious Affection of Land not Taken  
—Depreciation in Value—Change in Character of Street—Street Rail-  
way Lines—Local Improvement Assessment.*

The city corporation, under a by-law, took, for the purpose of widening a street, ten feet from the front of a lot of land upon which stood a dwelling-house. Upon an arbitration, under the provisions of the Municipal Act, to fix the compensation to be paid to the claimant (landowner) for the taking, the award gave the claimant: (1) a sum of money for the value of the land taken; (2) another sum for injuriously affecting the remainder of her land, by reason of the loss of a tree and the bringing of the street line ten feet nearer to the house; and (3) another sum for injurious affection, by “depreciation caused by the change of the general character of the street.”—

*Held*, that “due compensation” in sec. 437 of the Municipal Act, 1903, simply means a full indemnity in respect of all pecuniary loss by reason of the exercise of the powers of the corporation; and the only subjects of such pecuniary loss are: (1) the lands actually taken; and (2) the injury to the leasing or selling value of what is left. Assuming that the arbitrator intended in the second item to include all that tended to depreciate the value of the parcel retained by the claimant, there was nothing left capable of being reduced to a money basis; and the third item was improperly included in the award.

*Held*, also, that the arbitrator was right in (1) refusing to include in the award a further allowance because of a supposed intention on the part of the corporation to place a street railway upon the widened street; and (2) declining to entertain as an element of compensation the circumstance that the corporation were proceeding under the local improvement clauses of the Act, by virtue of which the claimant would be assessed for a portion of the cost of the widening.

APPEAL by the Corporation of the City of Toronto, contestants, and cross-appeal by Mary Pringle Macdonald, claimant, from an award of the Official Arbitrator for the City of Toronto, in an arbitration, under the provisions of the Municipal Act, to fix the compensation to be paid by the contestants to the claimant for the taking, under a city by-law, of certain lands required for the widening of St. Clair avenue.

The award gave to the claimant three sums, namely: \$587.40, the value of the land taken; \$750, for injuriously affecting the remainder of her land (a building lot upon which there was a dwelling-house), by reason of the loss of a tree on the land taken and the bringing of the street line ten feet nearer to the house; and \$250, for injurious affection, for “depreciation caused by the change of the general character of the street.”

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Only the last item was appealed against.

The cross-appeal was confined to two matters: (1) the dismissal by the arbitrator of a claim for a further allowance because of a supposed intention on the part of the city authorities to place upon St. Clair avenue a street railway; and (2) an omission to entertain as an element of compensation or give effect to the circumstance that the city corporation were proceeding under the local improvement clauses of the Municipal Act, by virtue of which the claimant would be assessed for a portion of the cost of the street widening in question.

May 3 and 6. The appeal and cross-appeal were heard by MOSS, C.J.O., GARROW, MACLAREN, and MAGEE, JJ.A., and LENNOX, J.

*H. L. Drayton*, K.C., and *C. M. Colquhoun*, for the city corporation, argued that no evidence had been adduced before the Official Arbitrator that any depreciation would be caused to the property of the respondent by the widening of St. Clair avenue; and that, even if such depreciation should arise, the corporation would not be liable to the claimant for damages, not arising out of the execution of the work, but by reason of the subsequent use of the street. They referred to the following authorities: *Caledonian R.W. Co. v. Ogilvy* (1856), 2 Macq. H.L. 229; *City of Glasgow Union R.W. Co. v. Hunter* (1870), L.R. 2 H.L. Sc. 78; *Horton v. Colwyn Bay and Colwyn Urban District Council*, [1908] 1 K.B. 327, *per* Lord Alverstone, C.J., at p. 332 *et seq.*; *Canadian Pacific R.W. Co. v. Gordon* (1908), 8 Can. Ry. Cas. 53; *Ontario and Quebec R.W. Co. v. Vallières* (1909), 11 Can. Ry. Cas. 1; *Rex v. Mountford*, [1906] 2 K.B. 814; *Powell v. Toronto Hamilton and Buffalo R.W. Co.* (1898), 25 A.R. 209; *In re Devlin and Hamilton and Lake Erie R.W. Co.* (1876), 40 U.C.R. 160.

*J. S. Fullerton*, K.C., and *H. C. Macdonald*, for the claimant, argued that the taking of the land by the corporation was for purposes not called for by the claimant, and was for the general benefit of the citizens of Toronto, other than the residents on St. Clair avenue, to whom it does not appear that any benefit is to accrue from the proposed work, the result of which is to bring the claimant's premises into greater proximity to the highway,

and thereby to cause her to be submitted to greater noise, dust, and disturbance, for which the sum awarded by the learned arbitrator is but small compensation. They relied upon the cases cited on behalf of the contestants, and also upon the following authorities: *Duke of Buccleuch v. Metropolitan Board of Works* (1871-2), L.R. 5 H.L. 418, at pp. 442, 444-446; *In re Stockport, etc., R.W. Co.* (1864), 33 L.J.N.S. Q.B. 251; *Cowper Essex v. Local Board for Acton* (1889), 14 App. Cas. 153; *Re Pryce and City of Toronto* (1889-92), 16 O.R. 726, 20 A.R. 16; *London and North Western R.W. Co. v. Reddaway* (1907), 23 Times L.R. 279; *City of Norfolk v. Chamberlain* (1892), 89 Va. 196, at pp. 236, 244, 249.

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September 27. GARROW, J.A. (after setting out the facts as above):—It is convenient, I think, to dispose of the cross-appeal first. And as to both my opinion is, that the learned arbitrator was right.

As to the first, there is no evidence that a street railway is immediately about to be placed upon that portion of St. Clair avenue adjoining the claimant's lands, and certainly none that it is to be placed upon the lands taken from her under the by-law. The ten feet strip taken from her is to be added to the now existing highway. The whole, including the ten feet taken on the other side of the street, will be highway under the control of the civic authorities, and may, I think, be used as any other highway may, as in fact the narrower St. Clair avenue might have been, without complaint from any of the adjoining proprietors. So that, in the end, even if it is decided to place a street railway upon the widened street, that alone can give the complainant no right to a special allowance because of that. What does she get the second item of the award for? She has in the first been paid for the land actually taken, and the second is given solely because of the extension of the highway. Must the city, in addition, pay because it intends to use or uses the widened street for any lawful purpose for which in the public interest it might have used the narrower avenue? See *Rex v. Mountford*, [1906] 2 K.B. 814.

As to the other item, the widening of the street is proposed

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to be done under the local improvement plan, the city paying a part and the proprietors a part; and, if one proprietor may be allowed what the claimant asks, all should be allowed the same, with the result that it would not be a local improvement at all, but a charge upon the general funds of the city. It is one thing to say that, if the claimant is being charged with a benefit, she may offset the amount of such benefit with the amount of the assessment which she is compelled to pay, which was the case of *Re Pryce and City of Toronto*, 20 A.R. 16, to which we were referred, and a totally different thing to say that the tax thus imposed is the proper subject of all allowances as part of the "due compensation" for which the statute provides.

I would, for these reasons, dismiss the cross-appeal as to both items.

And I would allow the appeal of the city. I am wholly unable to see any fact or principle upon which the third item can rest. Section 437 of the Consolidated Municipal Act, 1903, provides for "due compensation" being made to persons in the position of the claimant. And "due compensation" simply means a full indemnity in respect of all pecuniary loss by reason of the exercise of the powers of the corporation. And the only subjects of such pecuniary loss are: (1) the lands actually taken; and (2) the injury to the leasing or selling value of what is left. See, among the numerous cases on the subject, *Wadham v. North Eastern R.W. Co.* (1884-5), 14 Q.B.D. 747, 16 Q.B.D. 227, a case of special value, owing to the premises being a hotel; *Duke of Buccleuch v. Metropolitan Board of Works*, L.R. 5 H.L. 418, a residence; *In re Stockport, etc., R.W. Co.*, 33 L.J.N.S. Q.B. 251, a mill; approved in *Cowper Essex v. Local Board for Acton*, 14 App. Cas. 153; and *The Queen v. Moss* (1895), 5 Ex. C.R. (Can.) 30, at p. 36. The injury must be to the land itself, and must be such as affects its value; otherwise no claim can be made—nothing is allowable upon merely sentimental or æsthetic grounds or any other ground which does not affect value. Now, assuming, as I do from the course of the evidence and the wording of the award, that the arbitrator intended in the second item to include all that tends to depreciate the value of the parcel retained by the claimant, what is there left capable of being reduced to a money



basis? Nothing that I can see. The claimant may not like a wide street, or a wide pavement, or she may like a shady street or a street with boulevards or without them; but all these things, which apparently from his judgment are the basis of the allowance in question, have really nothing to do with the matter, in my opinion. Nothing has been altered so far by the city. The wide pavement and the other matters are all in the future, and all seem to involve the same principle as the street railway question. If it was right to disallow a claim in respect of that very palpable, even if ill-founded, objection, it was, I think, with deference, quite illogical to allow for what in the future the city may do in changing the general character of the street. As I have before said, the widened part for which the city pays becomes a part of the highway for all purposes. And no one can lawfully complain of the changing of a sidewalk or the widening of a pavement or the removal of a tree from the highway so under civic control.

I would, therefore, allow the appeal of the city with costs, and dismiss the cross-appeal with costs.

MACLAREN, J.A.:—Mrs. Macdonald is the owner of a lot on the north side of the avenue between Yonge street and Avenue road, and the by-law in question moves the northern line ten feet further to the north, and there is a like widening on the south side, making that portion of the avenue 86 feet wide instead of 66. Three-fourths of the expense of the improvement is to be borne by the city generally, and one-fourth raised by local assessment.

By her notice of arbitration, the claimant demanded compensation for the land taken and for the lands and property injuriously affected by the taking. At the close of the evidence, she was allowed to amend her notice so as to include a claim for injuriously affecting her remaining lands by the taking and user thereof and the proposed construction of a street railway along and upon the said highway.

The arbitrator awarded her \$587.40 for the land taken, \$750 for injuriously affecting by reason of the loss of a shade tree which was on the land taken and the bringing of the street line ten

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feet nearer the front of her house; and \$250 for depreciation caused by the change of the general character of the street—in all, \$1,587.40.

It is against this last item of \$250 that the city appeals.

It appears from the award that this was allowed under the added claim, nothing being allowed for the proposed construction of a street railway, the \$250 being “for depreciation caused by the change of the general character of the street.” The learned arbitrator was of opinion that, if a residential street like this was widened, and the widening converted into a green grass boulevard, the value of the property along the street would be decidedly increased; but, if the widening was given up to a dusty expanse of roadway, it would have a depreciatory effect.

I am of the opinion that all the damages which could be properly awarded in this case are included in the two first items, and that these cover the whole ground for which compensation may be given under the provisions of sec. 437 of the Municipal Act. The claimant should receive compensation for any damage necessarily resulting from the taking of her land and the widening of the street, beyond the advantage, if any, which may accrue to her from such widening. In arriving at such result in a case like the present, I do not think one can estimate it as, for instance, in the case of a farm where the land is worth so much per acre, and one can begin by reckoning the value of the land taken at so much per acre, and then go on to estimate the damage done to the remainder of the farm from its being injuriously affected. Where, as here, the front of a city lot is taken for the widening of a street, the intrinsic value of the land taken, *per se*, if it can properly be said to have an intrinsic value, may be an unimportant or even an insignificant element. There are city lots that would be just as valuable if they were not so deep, and where the widening of the street might increase instead of diminishing their value. A proper result would be arrived at by taking the value of the whole property immediately before the widening was determined upon, and its value immediately after, with a proper allowance for the forcible taking, and the difference should represent the proper amount of the award, due allowance being made for appreciation or depreciation from any other

cause. Although it was not arrived at by this simple method in the present case, yet I am of opinion that substantially the same result was reached by the arbitrator in the first two items, and the whole ground covered; and that, after he has exhausted the elements on which these are based, he has no right to go on and award an additional sum for the alleged changing of the character of the street. The city authorities might widen the paved part of the street without a widening of the street, and the owners would not be entitled to compensation on that account; and they may increase or reduce from time to time the width of such *via trita*. There is no certainty that the plans which were before the arbitrators represent what will be the actual width of the paved portion, and I do not think this should form the basis of a third element of damage in the present arbitration.

In my opinion, the appeal as to this third item should be allowed.

The claimant has cross-appealed on three grounds. The first is, that interest should have been allowed from the date of the by-law on the full amount of the award and not merely on the first item, as was done. This was conceded by counsel for the city, so it is not now in issue.

She also claims that she should have relief over against the city for what she may have to pay towards the twenty-five per cent. of the total expense of the improvements to be levied by local assessment from those specially benefited. This is rather a novel claim, and I can find no shadow of support for it in the case of *Re Pryce and City of Toronto*, 16 O.R. 726, cited in support. It is quite startling to think that a by-law passed in accordance with the Municipal Act could be got rid of in this way and practically nullified by a side-wind. In other words, that the twenty-five per cent. assessed on the properties specially benefited can be unloaded upon the city generally by a kind of jugglery. In my opinion, the arbitrator was quite right in disallowing this claim.

The third ground of cross-appeal is, that the claimant should have been allowed damages, her property being injuriously affected by the construction and operation of a municipal street

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railway on St. Clair avenue. In my opinion, this claim was properly disallowed. The question of the railway is quite separate and distinct from the widening of the street, and no land of the claimant was taken for the railway, nor does the question of the railway in any way arise in connection with the present arbitration. The cross-appeal on this point should be dismissed.

MOSS, C.J.O., MAGEE, J.A., and LENNOX, J., concurred.

*Contestants' appeal allowed, and claimant's  
cross-appeal dismissed.*

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[DIVISIONAL COURT.]

D. C.  
1912  
—  
August 7.  
Sept. 28.

CITY OF TORONTO v. WILLIAMS.

*Municipal Corporations—Prohibition of Erection of Apartment Houses on Residential Streets—2 Geo. V. ch. 40, sec. 10—City By-law—Permit before Statute—Building not Begun—"Location"—Revocation of Permit—Estoppel.*

By the Ontario statute 2 Geo. V. ch. 40, sec. 10 (assented to on the 16th April, 1912), a clause (c) was added to sec. 541a of the Municipal Act, 1903, as enacted by sec. 19 of the Municipal Amendment Act, 1904, giving power to municipal councils, "in the case of cities having a population of not less than 100,000, to prohibit, regulate, and control the location on certain streets to be named in the by-law of apartment or tenement houses . . ." On the 13th May, 1912, a by-law was passed by the plaintiffs' council forbidding the erection of apartment houses on certain named streets. The defendant, in May, 1911, had purchased a lot upon one of the streets named in the by-law, and in October, 1911, had begun the erection of a bungalow thereon. On the 31st January, 1912, he obtained from the proper officer of the plaintiffs a permit to erect an apartment house upon the same lot, to supersede the bungalow; but no work was done in pursuance of the new plan until July, 1912—after the passing of the statute and by-law, and notification to the defendant of the withdrawal of the permit:—

*Held*, that, giving the word "location" its primary and proper import, the statute and by-law forbade the *locus* being used for the purpose of putting an apartment house thereon; the "location" was not completed by the obtaining of the permit, coupled with the design or intention of the defendant; and the permit could not be regarded as an estoppel.

Judgment of BRITTON, J., reversed.

MOTION by the plaintiffs, the Corporation of the City of Toronto, to continue an interim injunction restraining the defendant from erecting an apartment house upon her lot on Brunswick avenue.

August 6. The motion was heard by BRITTON, J., in the



Weekly Court at Toronto, and, by consent of counsel, was turned into a motion for judgment.

*Irving S. Fairty*, for the plaintiffs.

*G. C. Campbell*, for the defendant.

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August 7. BRITTON, J.:—The defendant purchased the land upon Brunswick avenue in May, 1911. In the affidavit of the father of the defendant it is stated, and I have no doubt of the truth of the statement, that this lot was purchased by the defendant for the purpose of erecting an apartment house thereon. Shortly after the purchase, proceedings were taken for expropriating part of that lot, having in view the straightening of Brunswick avenue, and enlarging Kendall square. The defendant naturally halted as to then going on with the contemplated building. Subsequently the project or proposal, as to Brunswick avenue, was not gone on with; and the defendant then proposed to proceed with her apartment house.

In the latter part of 1911, the defendant applied to the City Architect and Superintendent of Buildings for permission to build, and submitted plans and specifications. The City Architect and Superintendent of Buildings knew that these plans and specifications were those of an apartment house; and on the 31st January, 1912, permission was granted to the defendant, in terms, "to erect a two-storey brick *apartment*, near Wells street, on Brunswick avenue, in Limit B., in accordance with plans and specifications approved by this department."

Water service was applied for, and granted by the plaintiffs, and paid for by the defendant. The work has not been rapidly proceeded with, but some work has been done; and there is not before me anything to indicate bad faith on the part of the defendant.

On the 16th day of April, 1912, an amendment to the Municipal Act was made (2 Geo. V. ch. 40, sec. 10) by which the following words were added as clause (c) to sec. 541a of the Municipal Act, 1903, as enacted by sec. 19 of the Municipal Amendment Act, 1904: "In the case of cities having a population of not less than 100,000, to prohibit, regulate, and control the location on certain streets to be named in the by-law of

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apartment or tenement houses and garages to be used for hire or gain.”

The plaintiffs contend that there has been no location of this contemplated apartment house; and so it can, under the recent amendment, be prohibited.

I am of opinion that what was done amounts to a “locating” of this house and a consent by the plaintiffs to its location.

The plaintiffs have assumed to revoke the permission given; and they say that power is given to do so by sec. 6 of the city’s building by-law, No. 4861. The alleged attempt at revocation was not for any of the causes mentioned in sec. 6.

The case, as presented to me, seems quite like *City of Toronto v. Wheeler*, 3 O.W.N. 1424. I agree with the decision and reasons for decision given by Mr. Justice Middleton. It would be manifestly unfair to the defendant—it would be rank injustice to her—after granting the permit, which, in my opinion, amounts to location, within the meaning of the statute, to step in now and stop the work, leaving upon her hands the lot she bought, the plans and estimates prepared, and the work, much or little, already done—of no value to her—other than for the house she desires to erect.

The action will be dismissed with costs.

The plaintiffs appealed from the judgment of BRITTON, J.

September 24. The appeal was heard by a Divisional Court composed of BOYD, C., LATCHFORD and MIDDLETON, JJ.

*Irving S. Fairty*, for the plaintiffs. There was no “location” of the proposed apartment house. The first work done, the excavation and bringing of stone for the bungalow cannot be considered in reference to the apartment house: *Travis v. Coates* (1912), *ante* 63. Therefore, the erection of such a structure can be prohibited under 2 Geo. V. ch. 40, sec. 10. “Location” in the statute is used in its ordinary sense, and means “a placing.” See Murray’s Dictionary and Latham’s Johnson’s Dictionary, *sub voce*. The intention of both the statute and the by-law is to forbid the placing of an apartment house on the site. The permit to build was only a license, which the plaintiffs had the right to withdraw.

*G. C. Campbell*, for the defendant. The granting of the permit amounts to a "location," and all prior work done on the property is referable to this. "Location" means only the choice of a site, the ascertaining of the place where the structure is to be erected. See the Century Dictionary, *sub voce*. It would be unfair to the defendant to stop the work which she is doing on the land on the strength of the permit given her by the plaintiffs: *City of Toronto v. Wheeler* (1912), 3 O.W.N. 1424.

*Fairty* in reply. The by-law is a declaration of public policy.

September 28. *Boyd, C.*:—This lot was purchased by the defendant in May, 1911, for \$10,000, at the rate of \$100 a foot. Land in the neighbourhood is now held at \$200 per foot.

On the 1st October, 1911, a permit was obtained for building on it a two-storey and attic dwelling (a bungalow); and, for the purpose of that project, a cellar was dug, 26 by 60 feet and 4 feet deep, and a small load of stone hauled there in the latter part of that month.

On the 31st January, 1912, a permit was obtained to erect an apartment house on the same lot (which would supersede the other permit); but no work was done in pursuance of this scheme till the 18th July, 1912, when a new excavation was begun on the north side of the lot, and more or less work done.

Before this last work on the lot, the defendant knew of a by-law being passed by the city on the 13th May, 1912, forbidding the erection of apartment houses on residential streets, which included this locality, and that former permits would cease and become invalid; and there was a letter received by him from the City Architect notifying him that the permit was withdrawn. Prior to this, the only work done on the place was referable to the abandoned bungalow scheme.

This by-law was pursuant to the powers given to cities by the statute 2 Geo. V. ch. 40, sec. 10 (assented to 16th April, 1912); and it follows the words of the Act. The prohibition is against "the location" on the street named of apartment houses.

The argument before us was, that the location of this apartment house (coupled with the defendant's intention to build thereon) had attached or had been completed when the permit was obtained, and that all the prior and subsequent work done

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on the lot was referable thereto, and, having been so acted upon, it was inequitable and incompetent for the city to recede or to revoke the location.

But it is to strain the meaning of the word "location" to give it this scope. No doubt, the word is used with a technical or conventional import when used in connection with lines of railway and other undertakings, as pointed out by Strong, C.J., in *The Queen v. Farwell* (1887), 14 S.C.R. 392, 426. But there is nothing in the statute to interfere with its etymological and ordinary meaning: *City of Toronto v. Ontario and Quebec R.W. Co.* (1892), 22 O.R. 344.

The word "location" is used in the statute in its primary and proper import, as given in Latham's Johnson's Dictionary (*sub voce*), namely: "Situation with respect to place; act of placing; state of being placed." Read the clause with this substitution of words: "Prohibit the situation with respect to place of an apartment house on the street." "Prohibit the act of placing a house on the street." "Prohibit the site of house being placed on the street." Any of these substitutes brings out the meaning, which is forbidding the *locus* being used for the purpose of putting an apartment house thereon.

The context and intent of the statute and by-law is to forbid the placing of an apartment house on that site. The preparation of the plans and specifications was no more than a preliminary to the application for a permit; and the permit, when granted, was merely to erect the proposed building, *i.e.*, to locate it on the site. No outlay has been incurred since the granting of this permit up to the date of its revocation, and no case of estoppel can be made out. The permit to build may be regarded as a license to build; but that the owner might withdraw from, as might also the city, in case the situation was not changed, in pursuance of the license. No such change is proved here; the only change appears to be a steady increase in the value of the land.

We cannot mistake the policy of the Legislature; the plaintiffs, as a public body, are called on to enforce it in proper residential neighbourhoods. While it may bear hardly on the individual owner, who is hampered in the free enjoyment of his property, still it is one of the effects of advancing civic life and



amenity that, for the sake of preponderating advantages to the whole locality, one proprietor may have to suffer deprivation.

This is said to be a test case, involving a score of other permits; and, this being so, and the point being without authority, it seems fitting, while we reverse the decision in appeal, to do so without costs.

The injunction is continued indefinitely while the prohibition continues.

LATCHFORD, J.:—"Location" is a word which in our day is used with many meanings. I think, however, that in the statute and by-law under consideration it is used only in its primary and etymological sense of "the act of placing." The mere design or intention which the defendant had of erecting an apartment house is not what is prohibited and penalised, but the actual placing of such a building. The by-law was enacted and in force before the defendant had done anything whatever in furtherance of her intention beyond obtaining the permit. What she had done previously was *alio intuitu*; and was, moreover, not the "location," in the sense in which the word is used in the by-law, of an apartment house upon his property.

I agree that the appeal should be allowed without costs.

MIDDLETON, J.:—In *City of Toronto v. Wheeler*, 3 O.W.N. 1424, matters had so far advanced that when the by-law was passed the building had been begun—the defendant had given "to airy nothing a local habitation" as well as a "name."

I fully appreciate that any prohibition of the owner's common law right to use his land as he sees fit, so long as no nuisance is committed, may in individual cases be regarded as a hardship; but this case must be determined upon the construction of the statute and the by-law, which is in the words of the statute.

It must not be forgotten that there is another side to the question of hardship. The statute is remedial, and is for the protection of those who, in residential districts, have built houses and laid out gardens which would be much depreciated by the erection of large and often unsightly buildings completely overshadowing them.

Even if it be admitted that the word "location" might mean

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something less than an actual placing upon the ground, and that it might be used to indicate the choice of a site for a projected building, it is clear that this is not what the Legislature meant to prohibit. That which is prohibited and rendered penal is not the mental process, the intention to use the land for the prohibited purpose, but the actual use of the land for that purpose. The extent of the prohibition may be gauged by the liability to the penalty.

The permit cannot be regarded as an estoppel, as at the time it was issued the city officials had no option. The statute, not then passed, could not be deprived of its effect by their action.

For this reason, the appeal must be allowed. It is not a case for costs.

*Appeal allowed.*

[IN THE COURT OF APPEAL.]

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*Bank—Winding-up—Contributories—Bank Act, sec. 125—Transfer of Shares after Commencement of Winding-up Proceedings—Recognition by Liquidator of Transferees as Contributories—Winding-up Act, sec. 21—Mistake—Election—Evidence—Estoppel—Laches—Prejudice—Powers of Liquidator.*

The appellants, who were the holders of paid-up shares of the capital stock of the Ontario Bank at the time of the commencement of winding-up proceedings, were *held* liable, under the provisions of sec. 125 of the Bank Act, R.S.C. 1906, ch. 29, there being a deficiency in the property and assets of the bank to pay its debts and liabilities, to an amount equal to the par value of the shares.

Transfers of the shares were made by the appellants and registered in the transfer-books of the bank after the winding-up proceedings began, but before the winding-up order was made; and, for some reason, the names of the transferees, and not the names of the appellants, were inserted in the first list of contributories prepared by the liquidator and settled by the Referee in the winding-up. Afterwards, upon the application of the liquidator, the Referee added the appellants' names to the list:—

*Held*, that the appellants could not escape liability by reason of the delay, by virtue of a supposed election of the liquidator to look to the transferees, or by estoppel, or otherwise.

*Per* GARROW, J.A.:—What was done by the liquidator and the Referee did not bring the case within the exception to be found in sec. 21 of the Winding-up Act, R.S.C. 1906, ch. 144, as to transfers made with the authority of the Court. It was a mistake or oversight on the part of the liquidator, and not the result of intention or design; and he alone was powerless to accept the transfers or release the appellants without payment. Mere delay in asserting the cause of action against the appellants was no defence; and there was no reasonable evidence that the delay was prejudicial to the appellants. And *quære*, whether, in any circum-

stances, estoppel could be successfully pleaded to such a claim. The liquidator's powers are limited; and he could not by mere laches accomplish what he could not with deliberation and intention do.

*In re National Bank of Wales, Taylor, Phillips, and Rickards' Cases*, [1907] 1 Ch. 298, distinguished.

*Per* MEREDITH, J.A.:—When the winding-up order was made, the appellants, as well as their transferees, were liable; and they had not become discharged from their liability. It was not a case for an election, because the liability was of each, not of only one or the other. The debt was a legal, statute-imposed debt; and no delay, short of bringing the case within some statute of limitations, could relieve the appellants. The delay in enforcing payment from the appellants was not the result of mere oversight.

Order of BOYD, C., affirmed.

AN appeal by John Massey and W. C. Lee from an order of BOYD, C., of the 4th December, 1911, dismissing their appeal from an order of George Kappele, Esquire, an Official Referee, in a reference for the winding-up of the Ontario Bank, settling them upon the list of contributories for 338 shares of the stock of the bank.

The reasons for the order of the Referee, in which the facts are stated, were as follows:—

This matter came before me on the 9th December, 1910, and the 7th July, 1911. Certain evidence was taken and certain admissions of fact made by counsel.

It is an application made on behalf of the liquidator to place John Massey and W. C. Lee on the list of contributories in respect of 338 shares standing in their names at the date of the suspension of payment by the bank, namely, the 13th October, 1906.

After the suspension of the bank, Massey and Lee transferred these shares, as follows—

On the 24th October, 1906, to William Lehman.....	50 shares
On the 26th October, 1906, to A. E. Webb & Co., in trust for J. L. Dawkins.....	10 shares
On the 26th October, 1906, to A. E. Webb & Co., in trust for James Phillips .....	8 shares
On the 26th October, 1906, to A. E. Webb & Co.....	270 shares

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338 shares

In bringing in the list of contributories, the liquidator proceeded against the transferees from Massey and Lee in respect

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of these shares, namely: William Lehman, 50 shares; J. L. Dawkins, 10 shares; James Phillips, 8 shares; A. E. Webb & Co., 270 shares; and recovered judgment against them respectively.

Massey and Lee were not placed on the original list of contributories by the liquidator in respect of these shares. The liquidator had no reason for not placing them on, but they were left off through an oversight.

The proceedings against the contributories by the liquidator continued against all the shareholders whom the liquidator claimed to hold liable; but Massey and Lee were not proceeded against in respect of these shares; and, as the admissions shew, it was not until after the litigation against the general list of contributories was disposed of, and until the call had been made, that the liquidator commenced this application in or about the month of November, 1910, to place Messrs. Massey and Lee on the list.

It appears from the admissions and evidence that A. E. Webb & Co., who, as between Massey and Lee and themselves, were liable to Massey and Lee for 270 of the shares in question, were, up to the time of the date of this application, solvent and financially able to pay the liability on the shares in question; but that, on or about the 29th November, 1910, while this application was pending, A. E. Webb, who traded as A. E. Webb & Co., realised on his assets in Ontario, and went to Los Angeles, California.

The contention of counsel for Massey and Lee is, that the liquidator elected to look to the persons primarily liable to Massey and Lee; and that, as a result of the proceedings against those primarily liable, and the omission to proceed against Massey and Lee along with the other shareholders on the general list of contributories, the liquidator has released Massey and Lee from all liability, and is now estopped from proceeding against them.

He also contended that, if the liquidator had proceeded originally against Massey and Lee along with the general list of shareholders, they could have recovered against A. E. Webb & Co., who were at that time solvent; and that, as a result of the action of the liquidator in delaying proceedings against them until after the general list was settled, and after A. E. Webb had absconded from the Province, their position was altered.



There is no doubt whatever that Massey and Lee should have been placed on the first list of contributories brought in pursuant to sec. 130 of the Bank Act, R.S.C. 1906, ch. 29. They were shareholders of the bank within sixty days before the commencement of the suspension, and as such were liable as in that section provided.

There is no such thing as a settled list of contributories. It is the duty of the liquidator and of the Court to see that all those shareholders who are liable under sec. 130 of the Bank Act are placed on the list; and, if omissions are made, they should be remedied. There can be no such thing as an election by the liquidator of the shareholders whom he is going to hold responsible. It is his duty to place on the list all persons liable under sec. 130 of the Bank Act. No question of estoppel or election can arise as against the liquidator under that section, as all shareholders within that section are liable.

The transfer by Massey and Lee to the persons primarily liable to them after the date of the suspension of the bank does not release them. It amounts to nothing more than shewing the position of the shares as between Massey and Lee and their transferees.

I refer to *Re Central Bank, J. D. Henderson's Case* (1889), 17 O.R. 110, judgment of Mr. Justice Robertson, at p. 120: "Questions may arise between the transferor and transferee as to the validity of the contract, and it might be prejudicial to the transferee if he allowed the finding of the Master to go unimpeached, as to which, however, I pass no opinion; but it is clearly in the interests of the creditors of the bank that all persons liable as shareholders should be on the list of contributories, and although the liquidators have acquiesced in the report of the Master, it must be borne in mind that they are the officers of the Court, and when the matter is brought to the notice of the Court, as it has been by this appeal, I think it the duty of the Court to protect the interest of the creditors and all parties concerned, and to see that all are charged who are legally chargeable, and being of opinion that all persons who were stockholders within the month next before suspension, no matter for how

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long a time, are either primarily or secondarily liable, their names should be placed on the list of contributories."

Also *In re Central Bank of Canada, Baines's Case* (1888), 16 O.R. 293, judgment of the Chancellor at pp. 304 and 305: "'Persons who having been shareholders in the bank have only transferred their shares or registered the transfer thereof within one month before the commencement of the suspension of payment by the bank shall be liable to all calls on such shares as if they had not transferred them, saving their recourse against those to whom they were transferred.' This, however, is to be read with sec. 70, which shews that the last shareholder, or the one who appears in the record of shares to be a holder *in præsenti* at the time of failure is liable. Section 77 is cumulative so as to make also liable those who have been holders during the month preceding the suspension. These should all be on the list of contributories, leaving them to discuss among themselves their respective liabilities: *Humby's Case* (1872), 26 L.T.N.S. 936. Section 45 of the Winding-up Act may also be read in this connection. Even if the statute had the effect contended for as to primary liability (with which opinion I do not agree), it would be still proper to put the name of this appellant on the list of contributories."

The liquidator is an officer of the Court, and has no power in winding-up proceedings to release any one (except under the authority of the Court) without the approval and sanction of the Court. Massey and Lee knew the facts in regard to their own position, and they were bound to know the law. They were always liable under sec. 130 of the Bank Act; and the mere fact that the liquidator omitted to place them on the list originally, and that in the meantime they did not pursue their remedies, thinking they were not going to be proceeded against, does not operate so as to release them.

A reference was also made by counsel for Massey and Lee to sec. 21 of the Dominion Winding-up Act, R.S.C. 1906, ch. 144, as affecting the question; and *In re National Bank of Wales, Taylor, Phillips, and Rickards' Cases*, [1907] 1 Ch. 298, was referred to. In that case the question arose under the provision of sec. 131 of the English Companies Act, 1862. The head-note of the case

reads as follows: "The power of a voluntary liquidator under sec. 131 of the Companies Act, 1862, to sanction a transfer of shares made after the commencement of the winding-up, involves the power to alter the register of members; and the transferor is thereupon released from the liability which he was under at the commencement of the winding-up to contribute as a present member, and the transferee alone is the person to be placed on the A list of contributories. Where successive transfers are sanctioned by the liquidator under sec. 131, the ultimate transferee only is liable to contribute as a present member, the transferor and prior transferees being liable as past members."

Section 131 of the English Companies Act, 1862, provides that whenever a company is wound up voluntarily the company shall, from the date of commencement of such winding-up, cease to carry on its business, except in so far as may be required for the beneficial winding-up thereof, and all transfers of shares, except transfers made to or with the sanction of the liquidators, or alteration in the status of the members of the company taking place after the commencement of such winding-up, shall be void. . . ."

The section is somewhat on the lines of sec. 21 of the Dominion Winding-up Act.

Section 21 of the Dominion Winding-up Act, however, is not at all applicable here. The Ontario Bank suspended payment on the 13th October, 1906. The petition for winding-up under the Dominion Winding-up Act was served on the 16th October, 1906, and the order appointing the liquidator was made on the 29th September, 1908.

While the transfers of the shares in question were made with the sanction of the curator, they were not made with the sanction of the liquidator or under the authority of the Court. Even if they were, the transfers could have no greater effect than to make the transferees the owners of the shares in question, but could not release the liability created under sec. 130 of the Bank Act against all persons who held the shares within sixty days before the commencement of suspension of payment by the bank; so that, in no view of the matter, can the transfers of the shares by Massey and Lee, even with the consent of the curator, after

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the suspension of the bank, affect the liability of Massey and Lee under sec. 130 of the Bank Act.

For these reasons, I find that Massey and Lee must be settled on the list of contributories for the 338 shares in question, with costs of this application.

The order of the Referee was affirmed by BOYD, C.; and Massey and Lee appealed.

April 22. The appeal was heard by MOSS, C.J.O., GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

*M. K. Cowan*, K.C., for the appellants. The liquidator elected to look to the persons primarily liable to Massey and Lee, and as a result of the proceedings against those primarily liable, and the omission to proceed against Massey and Lee along with the other shareholders on the general list of contributories, the liquidator has released Massey and Lee from all liability, and is now estopped from proceeding against them. If the liquidator had proceeded originally against Massey and Lee along with the general list of shareholders, they could have recovered against A. E. Webb & Co., who were at that time solvent; and because of the action of the liquidator in delaying proceedings against them until after the general list was settled, and after A. E. Webb had absconded, their position was altered. The liquidator sanctioned the transfers. "Sanctioned" means not only authorised, but ratified. The liquidator was appointed by the Court, and all the powers which the Court had authority to give to the liquidator were given by the order of the Court. Under such order, the liquidator had the authority of the Court to do all acts authorised by the Winding-up Act. When such authority of the liquidator is not limited, sec. 21 of the Winding-up Act gives the liquidator power to sanction transfers of shares and to alter the status of members after the commencement of winding-up proceedings. If the interpretation of sec. 21 requires the active authorisation by the Court to the sanction of the liquidator, the Official Referee gave such authority when the list of contributories was placed before him as drawn and sanctioned by the liquidator. Under the Winding-up Act, contributories become



liable only when calls are made upon them; the transfer of the shares in question was made after the commencement of winding-up proceedings, and by such transfer all liabilities of the transferors were transferred to the transferees, and the liquidator so elected to rely upon Lehman and Webb & Co. respectively solely for any calls to be made. I refer to the following authorities: *In re National Bank of Wales, Taylor, Phillips, and Rickards' Cases*, [1907] 1 Ch. 298; *Aikins v. Dominion Live Stock Association of Canada* (1896), 17 P.R. 303, at p. 309; *In re National Bank of Wales, Massey and Giffin's Case*, [1907] 1 Ch. 582; *In re Joint Stock Discount Co., Fyfe's Case* (1869), L.R. 4 Ch. 768.

*James Bicknell*, K.C., and *G. B. Strathy*, for the liquidator. At the date of the suspension of the Ontario Bank, the appellants were shareholders, and their liability to contribute to the assets was thereupon fixed. They were shareholders at the date of the commencement of the winding-up, and as such are liable as contributories, and they have not been released from their liability. Their liability has not been barred by any statute of limitations, and so delay does not matter. All the facts constituting the liability of the appellants as contributories were known to them; and any failure upon their part to protect themselves against the legal consequences cannot be visited upon the respondent. In the absence of an order made by the Court releasing the appellants from liability, they cannot escape. They are not entitled to set up an estoppel against the Court. The effect of the transfers to Lehman and Webb & Co. was to enable the appellants to obtain a summary remedy in the liquidation against such transferees, but such transfers could not and did not relieve the appellants from their own liability. The liquidator never elected and had no power to rely upon Lehman and Webb & Co. as the only parties liable as contributories in respect to the shares in question. I refer to *Boulton v. Gzowski* (1897. 8), 24 A.R. 502, 29 S.C.R. 54.

*Cowan*, in reply.

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September 30. GARROW, J.A.:—Appeal by John Massey and W. C. Lee from an order of the Chancellor dismissing an appeal

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from the order of an Official Referee placing the appellants upon the list of contributories in winding-up proceedings.

No written judgment was delivered by the learned Chancellor; but the facts are very fully stated and discussed in the judgment of the learned Referee: with whose conclusions I also agree.

The shares in question having been fully paid-up, the liability now sought to be imposed upon the appellants arises under the provisions of sec. 125 of the Bank Act, making shareholders liable upon a deficiency in the property and assets of the bank to pay its debts and liabilities, to an amount equal to the par value of the paid-up shares held by them.

It is admitted that the appellants were the holders of the shares in question on the 13th October, 1906, when the winding-up proceedings began. The subsequent transfers by the appellants were made after the winding-up proceedings began, and, therefore, clearly fall within the prohibition contained in sec. 21 of the Winding-up Act. This difficulty in the appellants' way is, in my opinion, quite insuperable. That section provides that all transfers after the commencement of the winding-up proceedings—except transfers made to or with the sanction of the liquidator, under the authority of the Court—shall be void. It is not claimed, and it could not be, that the mere entry in the transfer books of the bank of such transfers was effective to relieve the appellants. That was done while the curator was in charge, long before the winding-up order was made—which, for some reason, was not actually made until the 29th September, 1908, or nearly two years after the proceedings began.

What is claimed, as I understand counsel for the appellants, is, that the effect of the subsequent action of the liquidator in preparing and having settled the first list of contributories, in which the names of the transferees were inserted and the names of the appellants omitted in respect of these shares, was to bring the case within the exception to be found in sec. 21, as that of transfers made with the authority of the Court, or at all events it amounted to an election to accept the transferees in the place and stead of the appellants; which in itself, or as coupled with

the alleged laches of the liquidator in making the present claim, amounted to an estoppel.

In his judgment the learned Referee says: "Massey and Lee were not placed on the original list of contributories by the liquidator in respect of these shares. The liquidator had no reason for not placing them on, but they were left off through an oversight." How the oversight occurred is not explained; but it is not improbable that the long interval between the initiation of the winding-up proceedings and the winding-up order had something to do with it. When the books of the bank passed into the hands of the liquidator, the shares in question apparently stood in the names of the transferees of the 24th and 26th October, 1906, and it was not observed that these dates were subsequent to the 13th October, 1906, when the winding-up proceedings began. But, however, the mistake occurred, that it was anything more than a mistake or oversight on the part of the liquidator is entirely unsupported by the evidence. There is not from beginning to end a particle of evidence that what was done was the result of intention or design on the part of the liquidator or the learned Referee. The liquidator alone was powerless to accept the transfers or to release the appellants without payment. And, in the total absence of facts or circumstances indicating intention or even consideration of the matter by the learned Referee, to ascribe to his act in approving of the first list the wide effect contended for, seems quite out of the question.

Nor, in my opinion, is there in the alleged estoppel sought to be set up any answer to the liquidator's claim to add the appellants. He asserts and relies upon a legal cause of action arising under the provisions of the statute. To such a claim mere delay in asserting it is no defence. But, in addition, there is no reasonable evidence that what delay there was was prejudicial to the appellants. Their transferees, to whom they look for indemnity, were upon the list, were proceeded against, and judgments against them obtained, apparently in due course. And there is a total absence of anything but suggestion that the appellants could have done more to compel payment if they had themselves been originally upon the list.

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And, finally, there is, in my opinion, grave doubt if estoppel could be successfully pleaded to such a claim, under any circumstances. The proceeding is a compulsory winding-up under the direction and control of the Court. The liquidator was appointed by the Court, is an officer for the time being of the Court, and except in minor matters acts entirely under its direction. See *In re Contract Corporation, Gooch's Case* (1872), L.R. 7 Ch. 207. So limited are his powers that it has been said that he cannot even make a formal admission (sometimes said to be the foundation of an estoppel *in pais*) which will bind the creditors and contributories. See *Re Empire Corporation (Limited)* (1869), 17 W.R. 431. Under sec. 36 of the Winding-up Act, he may, with the approval of the Court, compromise calls, etc., "upon the receipt of such sums . . . as are agreed upon;" but, without the consent of the Court, he could not lawfully accept less than payment in full.

It would certainly be an odd result to hold that he could by mere laches accomplish that which he could not with deliberation and intention do.

I do not overlook what was said by Parker, J., in *In re National Bank of Wales, Taylor, Phillips, and Rickards' Cases*, [1907] 1 Ch. 298, cited among other cases by the learned counsel for the appellants. That, however, was a very different case. It was, to begin with, a voluntary winding-up, and the liquidator's powers were larger than in a compulsory winding-up. Then the liquidator was there asserting a claim based upon an equity, and was met by the equitable answer of his laches; which was held by the learned Judge to be a good answer. Upon the decision itself I express no opinion. It is enough to say that, in my view, it has no application to the circumstances of this case.

See for a different view as to the effect of the lapse of time in the case of a compulsory liquidation, *Re East India Cotton Agency (Limited), Sand's Case* (1875), 32 L.T.R. 299, 301.

I would dismiss the appeal with costs.

MEREDITH, J.A.:—When it is admitted, as it was upon the argument of this appeal, that, at the time when the winding-up order was made, the appellants, as well as their transferees, were



severally liable for the payment of the calls in question in this matter, this appeal, as it seems to me, becomes hopeless.

In what manner have the appellants become discharged from that liability?

By an election, it is said, to seek payment from their transferees. But the case never was one calling for any election: it is a case of liability of each, not of only one or the other.

Then, it is said, by delay. But the debt is a legal, statute-imposed, one, which it was the duty of the debtors to pay; so how can delay, short of bringing the case within some statute of limitations, relieve the appellants from that which they delayed, as well as those who ought to have enforced payment sooner, delayed?

I am unable to see any way of escape, even under the law favouring sureties, from the extraordinary liability in question, which the statute-law of the land has imposed upon the appellants, as well as their transferees, leaving the appellants to seek relief from such transferees.

But I am unable to agree in the finding, if such it be, of the Referee, that the delay in enforcing payment from the appellants was the result of mere oversight; I have no doubt that the liquidator's faith in the ability of the transferees to pay, until it was shocked by the absconding of one of them, was the real cause of it.

None of the cases relied upon by the appellants are at all applicable to this case; in which there was no breach of any duty owed to the appellants: and in which there is, as it seems to me, really little, if anything, more to complain of—from the legal point of view—on the appellants' part, than that they were not compelled to pay the debt—which they ought to have paid without compulsion—sooner.

I would dismiss the appeal.

MOSS, C.J.O., MACLAREN and MAGEE, JJ.A., concurred in dismissing the appeal.

*Appeal dismissed with costs.*

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Sept. 30.

*Landlord and Tenant—Lease of Farm by Tenant for Life—Rights of Lessee and Remainderman at Death of Life-tenant—Crops in the Ground—Emblements—Manure and Straw—Covenant to Expend upon Farm.*

A lease for five years of land in which the lessor had a life estate only was held to have been put an end to by the death of the lessor during the term; but the wheat then sown and in the ground became emblements belonging to the lessee; and these being purchased from the lessee by the plaintiffs, the executors of the lessor, the defendant, the remainderman, became liable to them for their conversion.

Not so, however, the straw and manure on the farm at the determination of the lease. By the terms of the lessee's covenant, these were to be kept and utilised on and for the land, and were not the property of or removable by the lessee: the straw and manure, as "accessories of the soil," passed to the remainderman with the land freed from the demise. Review of the authorities.

*Gardner v. Perry* (1903), 2 O.W.R. 681, not followed.

Judgment of the County Court of the County of Simcoe varied.

APPEAL by the defendant from the judgment of the Junior Judge of the County Court of the County of Simcoe, in favour of the plaintiffs, for the recovery of \$125 damages, in an action in that Court.

The Junior Judge's reasons for judgment were as follows:—

This is an action brought by the executors of one Patrick Farrell, deceased, to recover the value of certain wheat, straw, and manure alleged to have been the property of the plaintiffs and converted by the defendant to his own use. The wheat, straw, and manure were produced on the north-east quarter of lot number 3 in the 3rd concession of the township of Tecumseth, county of Simcoe. This land formerly belonged to one Mary Farrell, who died, and by her will devised to the said Patrick Farrell what for the purposes of this action may be considered a life estate in the said land, with remainder over to the defendant, Thomas Farrell. Patrick Farrell entered into possession of the said land, and, by indenture of lease dated the 23rd March, 1909, leased the said land to one Joseph Hanley for a term of five years from the 1st March, 1909. The said Joseph Hanley went into possession under the lease; and, while so in possession, on the 18th February, 1911, the said Patrick Farrell died, whereupon the said land vested in the defendant Thomas Farrell, in fee simple, subject to certain charges under the

will of the said Mary Farrell, deceased, which do not affect the question herein to be determined.

In the summer and fall prior to the death of the said Patrick Farrell, the said Joseph Hanley had ploughed some of the said land, had done summer-fallowing, and put in fall-wheat; and, at the time of the said Patrick Farrell's decease, the said fall-wheat was growing on the said land, and there was also on the said land at the same time a quantity of manure and straw.

Probate of the will of Patrick Farrell was granted to the plaintiffs on the 3rd March, 1911.

On the 9th March, 1911, the said Joseph Hanley signed a memorandum endorsed on the lease, purporting to cancel the lease and to give up all his claims under the lease, for the express consideration of \$20. This memorandum was not under seal. On the same day, namely, the 9th March, 1911, but some hours after the signing of the memorandum of cancellation, the said Joseph Hanley signed, under seal, a document, referred to as exhibit 5, purporting to be an assignment of the lease and all his claims thereunder to the plaintiffs, the consideration therein named being the sum of \$20. Then, on the 4th April, 1911, the defendant entered into an agreement to sell the said land to one Timothy Maher, and on the 20th July, 1911, by deed, conveyed the said land to Timothy Maher, who went into possession on the 5th or 6th of April, 1911, of the said land, and reaped the said wheat crop and received the said straw and manure and the benefit of the said fall-ploughing, summer-fallowing, seeding down, etc. Joseph Hanley went out of possession of the said land on or about the 4th April, 1911.

This action is now brought by the executors of the said deceased Patrick Farrell to recover from the defendant the value of the said crops, straw, manure, ploughing, etc., alleging that the defendant converted them to his own use by selling the same to Maher.

It is, I think, a well-settled rule of law that, upon the death of a tenant for life, his representatives, or where he had a subtenant, then the subtenant, are entitled to what are known as emblements, which consist of some crop which may be standing and growing on the land at the death of the tenant for life, and which is the

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result of his own planting, such as wheat and other similar grain. In this case there can be no doubt that the crop of wheat growing at the time of the death of Patrick Farrell would come under the head of emblements and would belong to the subtenant Hanley, and not to the plaintiffs, unless properly assigned to them by Hanley. The plaintiffs claim the benefit of the assignment (exhibit 5), and the defendant contends that, as this was executed after the memorandum of cancellation was endorsed on the lease, it could have no effect. A memorandum of cancellation of a lease, not being under seal, could not have any force without being accompanied by the actual giving up of possession, and in this case the subtenant did not give up until long after the assignment (exhibit 5) had been signed. In any event, the lease had been determined by the death of Patrick Farrell; and, the memorandum of cancellation being given at the request of the plaintiffs, I should consider that, if it could be regarded as giving up any claims to emblements, it was intended to give them up to the plaintiffs; and, in furtherance of this intention, the assignment (exhibit 5) was signed for the purpose of completing the transfer. I would, therefore, hold that the assignment conveyed to the plaintiffs such property as Hanley was entitled to on the 9th March, 1911, by way of emblements, and also any property he might have in straw and manure, and any other rights arising out of the lease and his tenancy of the said lands. And I further hold that, as the assignment transferred the emblements, etc., to the plaintiffs, before any sale by the defendant to Maher took place, and, therefore, before any conversion by the defendant, the plaintiffs took the property in them, they being goods and chattels, and not merely a right to sue; and, therefore, notice of the assignment was not necessary before the plaintiffs could bring this action.

The plaintiffs' right to the straw and manure can also be based upon another view of the facts. The lease to Hanley contained the usual clause found in farm leases that the manure and straw should not be removed by him, but should be expended by him on the farm. Under the authority of *Gardner v. Perry* (1903), 2 O.W.R. 681, where the identical words found in the lease herein were used, I am bound to hold that the straw



and manure belong to the plaintiffs. I am of opinion, therefore, that the plaintiffs were entitled to the crop of wheat and straw and manure left on the farm by Hanley at the time of his giving up possession of the farm.

It was also contended that the plaintiffs were entitled to compensation for the fall-ploughing and other benefits of the summer-fallowing to the land under the head of tenant's rights. I do not agree with this. Tenant's rights such as these depend on custom or agreement; and it has not been shewn that there is any such custom in this country, nor is there anything in any agreement entitling the plaintiffs to succeed on this part of their claim.

It is further contended by the defendant that, even if the emblements, etc., were the property of the plaintiffs, he did not convert them to his own use, and that, if the plaintiffs have any cause of action, it is not against him, but against Maher, the man who purchased the farm. I feel that, on the evidence, I am bound to hold that the defendant did, as far as he could, sell the said goods and chattels along with the farm to Maher, and that he intended to do so. The evidence of Atkinson, Joseph McLaughlin, Joseph Hanley, John McLaughlin, and A. W. Burke, all clearly shewed that the defendant was repeatedly told that the plaintiffs or Hanley claimed to be allowed for the wheat, straw, manure, etc., and that he continually asserted that the place and everything passed to him under the will. Maher's evidence was to the effect that he gave \$50 more for the farm because he was given to understand by the defendant that he was to get the benefit of the ploughing and fall-wheat.

There are also the letters of Mr. Fraser to the defendant making claims in regard to these matters, and the defendant's letters of the 13th March and the 30th May, all indicating the defendant's contention. In his letter of the 13th March, he says: "I hold the fall-wheat and ploughing until such time as it is sold or rented." In addition to all this, he had the farm advertised for sale in the bill issued advertising for sale the chattels belonging to the deceased Patrick Farrell, and the fall-wheat, ploughing, and seeding down, were all referred to by way of inducement to intending purchasers. All this evidence is conclusive, to my mind, that the defendant did sell the wheat,

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straw, and manure to Timothy Maher, notwithstanding all the claims made on behalf of the plaintiffs; and the defendant's constant assertions that these chattels passed to him with the land, in answer to the plaintiffs' claims, made any other or further demands unnecessary.

I, therefore, hold that the defendant did convert the said chattels to his own use on or about the 4th April, 1911, by selling the same to Maher, and that the plaintiffs are entitled to damages for such conversion.

The value of the chattels at the time of the conversion should be the amount of such damages. The evidence of Maher shews that there were about three loads of straw in stack and in the barn, worth about \$5 per load, and about forty loads of manure in the barn-yard, worth \$1 a load to the owner of the land. I do not think this manure would be worth \$1 per load to the plaintiffs, because they would have the expense of hauling it away from the farm. I would put it at 50 cents per load. The value of the wheat should be taken at what it was worth at the time of the conversion, namely, on the 4th April, 1911. No evidence was given as to what its value was then. All the evidence was directed to the cost of the summer-fallowing and putting in of the wheat and to the amount the crop yielded and the price it was worth after being threshed. The entire crop turned out 160 bushels; this would be an average of about 18 bushels to the acre, there being in the neighbourhood of 9 acres. This is hardly up to the average crop, and is not considered a large crop. The price ranged from 85 cents to 95 cents at the time it was ready for market, and of course there would be the straw from this crop. The cost of harvesting, threshing, cleaning, and hauling to market, besides the risk from April to harvest-time, and probably rent of land, should be considered. I think if I put the value at \$10 per acre, in all \$90, on the 4th April, 1911, it would be fair and reasonable. This would be \$15 for straw, \$20 for manure, and \$90 for wheat, making a total of \$125.

There will be judgment for the plaintiffs for this amount with costs.

September 25. The appeal was heard by a Divisional Court composed of BOYD, C., LATCHFORD and MIDDLETON, JJ.

*J. E. Jones* and *E. W. Clement*, for the defendant. The action is not maintainable, because no notice in writing of the assignment by the tenant Hanley to the plaintiffs was given to the defendant prior to the bringing of this action: *McMillan v. Orillia Export Lumber Co.* (1903), 6 O.L.R. 126; *McCormack v. Toronto R.W. Co.* (1907), 13 O.L.R. 656; *Cohen v. Webber* (1911), 24 O.L.R. 171. The covenants in the lease with respect to the straw and manure were made for the benefit of the land. Such covenants and the benefit thereof run with the land; and, in the circumstances, such straw and manure became the property of the defendant as reversioner. If and in so far as the case of *Gardner v. Perry*, 2 O.W.R. 681, is an authority against this contention, such case is wrongly decided, and the cases cited as authority therefor do not warrant the conclusion which the learned trial Judge finds to have been arrived at in that case upon this point. By virtue of sec. 42 of the Settled Estates Act, R.S.O. 1897, ch. 71, the deceased Patrick Farrell had power to grant a lease for the term granted by the lease; and if, as would appear, the lease is not a good and valid exercise of that power as against the defendant, then, by virtue of sec. 24 of the Real Property Act, R.S.O. 1897, ch. 330, which section is now sec. 11 of the Landlord and Tenant Act, 1 Geo. V. ch. 37, the lessee Hanley had the right to call for a grant of a valid lease under such power, of like purport and effect, save so far as any variation thereof might be necessary in order to comply with the terms of such power. The existence of this right is clearly inconsistent with, and is given by statute in lieu of, any right to emblements which the lessee, in such circumstances, would otherwise have had. Therefore, on the death of Patrick Farrell, the estate (if any) of Patrick Farrell and his tenant Hanley came to an end; in Hanley there remained, not the right to emblements, but the right to call for a new lease under the statute; instead of which, Hanley, having, as he admits, no desire to continue for the remainder of the term, released his rights and surrendered possession of the land. Neither Hanley nor the plaintiffs, claiming as his assignees, can, therefore, maintain any action for the value of the things in question as emblements.

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*A. E. H. Creswicke*, K.C., and *J. Fraser*, for the plaintiffs. By the assignment from the tenant Hanley, the plaintiffs took the emblements as goods and chattels, and not merely a right to sue; and, therefore, notice of the assignment was not necessary. The defendant admits that the death of Patrick Farrell put an end to the estates of Farrell and his tenant Hanley. Therefore, the wheat in the ground became emblements which were transferred by Hanley to the plaintiffs; and the defendant is liable for their conversion. The lease stated that the manure and straw should not be removed by the tenant, but should be expended by him on the farm. Therefore, under the authority of *Gardner v. Perry*, 2 O.W.R. 681, these things passed to the executors of the lessor.

*Jones*, in reply.

September 30. The judgment of the Court was delivered by BOYD, C.:—The appellant's contention that the lease for five years from March, 1909, was operative for that period despite the death, in February, 1911, of the tenant for life, who made it, is answered, apart from its legal aspect, by his admission in the defence that the tenancy ended at the death of the lessor: paragraph 2. He admits that, "upon the death of Patrick Farrell, the estates of the said Farrell and his tenant (Hanley) became determined and at an end." This being so, the wheat then sown and in the ground became emblements belonging to the tenant Hanley. These emblements were purchased by the executors of the lessor, Patrick Farrell, and an assignment thereof obtained under seal on the 9th March, 1911. The reversioner, the defendant, assumed to deal with as his property and make sale and conveyance of the land and these crops in July, 1911, to one Maher, whereby he became liable for their conversion under the circumstances and evidence set forth below.

The action is well-founded in this regard, and the judgment as to them in favour of the executors is right.

The other branch of the appeal is as to straw and manure on the farm at the determination of the lease. By the terms of the lessee's covenant, these were to be kept and utilised on and for the land; and, according to the authorities, they were



not the property of or removable by the tenant. So that the neat point is, whether this straw and manure passed to the reversioner with the land freed from the demise, or did they pass to the executors of the lessor? The judgment in appeal decides in favour of the plaintiffs, the executors, grounded on the decision of Osler, J.A., to that effect in a like case, *Gardner v. Perry*, 2 O.W.R. 681. The correctness of that decision is impeached by this appeal.

The straw-stacks and the manure-piles are the chattels of the tenant to be used in a particular way; the straw as bedding and fodder for the cattle is to be turned into manure, and the manure is to be turned into the land so as to enrich the soil and become part of it. While the tenant may be called the owner in one sense, the effect of his covenant not to remove from the premises, but to use and spend thereon, the straw and manure, is, that he has no right to take these things away from the place, nor when left on the place has he any right to be paid for them: *Beaty v. Gibbons* (1812), 16 East 116, 118; and *Roberts v. Barker* (1833), 1 Cr. & M. 808.

The law is obscure on the precise point. The dung made on the farm is spoken of as "belonging to the farm" in *Hindle v. Pollitt* (1840), 6 M. & W. 529, 533. To remove this stuff, even apart from the covenant, would be a failure to work in a husbandlike manner, and would be an injury done to the inheritance: *Cheetham v. Hampson* (1791), 4 T.R. 318, 319; *Walton v. Johnson* (1848), 15 Sim. 352; *Powley v. Walker* (1793), 5 T.R. 373. The tenant, being unable to remove because of his covenant, is to leave the straw and manure on the farm for the landlord; so it is put in *Massey v. Goodall* (1851), 17 Q.B. 310, 316. The provision is with a view to benefit of the land: *Richards v. Bluck* (1848), 6 C.B. 437, 441. In the last case I have found, Vaughan Williams, L.J., deals with the situation in this way: the provisions in the lease are intended for the purpose of ensuring proper cultivation of the land according to the rules of good husbandry. One thing which is clearly for the advantage of the land is that the crops should be dealt with in such a manner that the land may not become impoverished. The straw and manure clauses relate to things which have existence on the

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farm and which can be dealt with actively or left passively for the benefit of the farm: *In re Hull and Lady Meux*, [1905] 1 K.B. 588, 590.

Now these chattels are the tenant's, but he cannot avail himself of them in any way, because, by the death of the life-tenant, the tenancy is at an end, and these are not emblements. But not only is the tenancy at an end—the estate and interest of the lessor as landlord is at an end. No title was in him during his life which could at his death pass to his executors, as was held by the learned County Court Judge in this case, following the decision under consideration of *Gardner v. Perry*. In the case of a living landlord, the straw and hay at the end of the tenancy would be left on the land, and would fall under the control of the landlord by virtue of his ownership of the land. The straw and manure may be regarded as constructive fixtures, the destiny of which is to be incorporated in the soil. That points the way to the proper conclusion in this appeal, viz., the death of the life-tenant ended his interest in the land and everything lying upon it that could not be legally removed; but his death brought, forthwith and *eo instanti*, into virtual possession the estate in fee of the remainderman, who, as lord of the land, takes the farm with the straw and manure thereon as “accessories of the soil.” (See Amos and Ferard on Fixtures, 3rd ed., p. 215, n.)

I think the decision in 2 O.W.R. is not to be followed on this point, and that the judgment in appeal should be varied by restricting it to the value of the wheat in the ground, \$90, and dismissing it as to the straw and manure on the ground (\$35), which passed to the defendant as remainderman, to the exclusion of any claim on the part of the executors of the life-tenant.

This conclusion is fortified in another way. The provisions of the lease to till and manure in a good husbandlike and proper manner, and to spend, use, and employ in a proper husbandlike manner, all the straw and manure which shall grow, arise, or be made thereon, and not to remove or permit to be removed from the premises any straw of any kind, manure, etc., are usual and customary provisions for the right farming of the land, which apply generally, not only when expressly set out, but as of course, in farming leases, unless the contrary is expressed. Such is the

law of England, and is alike applicable to the farm lands of this Province: *Brown v. Crump* (1815), 1 Marsh. 567, 569, quoting the language of Buller, J.

This rule of proper use of the land applies as between landlord and tenant and also between tenant for life and remainderman. To neglect these precautions against the deterioration and impoverishment of the land savours of waste. While the life-tenant is entitled to the use of the property and to the receipt of all the income and profits, he is in such fiduciary relationship to the remainderman that he is not allowed to injure or to deal with the estate to the detriment of the inheritance. To allow the executors of the life-tenant to take away from the land, after death has freed the estate for the remainderman, the straw and manure left on the land for its nourishment, would be to reduce unduly the rights of the land-owner.

As to the costs, perhaps the best disposition of them would be to give costs on the Division Court scale to the plaintiff without set-off, and no costs to either party of this appeal.

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[DIVISIONAL COURT.]

REDFERNS LIMITED v. INWOOD.

*Estoppel—Representing Person as Wife—Goods Supplied by Tradesmen on Credit—Liability—Credit, to whom Given.*

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Where a man represents a woman to be his wife, and a third party acts upon that representation, the man is estopped from saying that she is not his wife.

Review of the authorities.

The plaintiffs supplied articles of attire, suitable to her apparent station in life, to the defendant Z., upon credit, believing her to be the wife of the defendant I., who introduced her as such to them:—

*Held*, that, as there was nothing in the evidence to indicate that the defendant Z. was buying or the plaintiffs selling on any but the credit of I., the defendant Z. was not liable.

The fact that the goods were charged in the plaintiffs' books to the defendant Z., under the name of "Mrs. I.," did not, upon the evidence, assist in shewing that the woman was the person credited.

APPEAL by the defendant Zimmerman from a judgment of the County Court of the County of York.

The following statement of the facts is taken from the judgment of RIDDELL, J. :—

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Mrs. Zimmerman, one of the defendants, a widow from Pittsburg, became acquainted, in Ottawa, with the other defendant, F. G. Inwood Jr., manager in Toronto of a motor sales company; she came with him to Toronto in May, 1911, and went and lived with him here as his wife, continuing so to do for some six months, when, as we are told, he absconded.

In May, 1911, she was told by Inwood that he had business dealings with the plaintiffs, and he would like her, if she bought anything in Toronto, to buy it from them; he took her into the plaintiffs' premises and introduced her to the manager, no doubt, as his wife; Mrs. Zimmerman said she wanted to buy a coat, and was turned over to the saleswoman. Nothing was said as to credit or as to charging, etc., between Mrs. Zimmerman and the saleswoman; but, as the saleswoman's custom was to charge goods bought to the person actually buying, the goods were charged to "Mrs. F. G. Inwood." The custom was not to charge the husband unless the husband himself asked it, or the wife asked it in the presence of her husband; even if the wife did ask that the goods should be charged to the husband, unless the husband was there, they were charged to the wife.

The trial Judge finds, on a conflict of evidence, that there was no direction to the saleswoman to charge to Mr. Inwood—and the witness whom he believes says that nothing was ever said about giving credit to him. As I have already said, there was nothing said between saleswoman and purchaser about credit at all. The account was opened in the name of "Mrs. F. G. Inwood;" and the goods were sent out addressed in the same way.

Mrs. Zimmerman went again and again to the plaintiffs' place of business, at least twice with Inwood, and bought articles of attire as she needed them. Nothing was said about credit, and the goods bought were debited in the ledger and sent out in the same way—a statement being rendered to her, in her assumed name, each month.

In July the motor sales company rendered an account to the plaintiffs, and, by arrangement with Inwood, the plaintiffs charged the account standing in their books against Mrs. F.



G. Inwood, against the motor sales company; and the same kind of transaction took place in September. On the 20th November, there was a debit against the account of \$104; and this the plaintiffs charged to the motor sales company. Inwood absconded on the 15th December, and at the end of that month the amount was retransferred against Mrs. F. G. Inwood.

All the articles bought were what may fairly be considered as necessary for a woman in her apparent station in life.

On the 8th December, the plaintiffs "dunned" Inwood for the amount of an account "representing goods purchased by Mrs. Inwood"—and afterwards placed the matter in the hands of their solicitors. To a letter of the solicitors, Inwood answered, "I expect to take care of same at an early date and send cheque." It is said that "Mrs. Inwood," on being telephoned to on two occasions, said that Mr. Inwood would attend to the matter.

An action was brought in the County Court of the County of York in January, 1912, against F. G. Inwood Jr. and Mrs. F. G. Inwood Jr., for \$119.25; and, the style of cause being amended by substituting Mrs. Zimmerman's real name, the statement of claim set out that she bought the goods, and Inwood agreed with the plaintiffs that, if she did not pay, he would. The action was discontinued against Inwood: Mrs. Zimmerman denies pledging her personal credit, and says the purchases were on the credit and authority of Inwood.

At the trial before His Honour Judge Denton, he gave judgment against Mrs. Zimmerman for the full amount, and she now appeals.

September 19. The appeal was heard by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.

*T. N. Phelan*, for the appellant, argued that she had implied authority to pledge Inwood's credit for the purchase of the goods, as a reputed marriage is a sufficient basis for the husband's liability: *Watson v. Threlkeld* (1798), 2 Esp. 637; 21 Cyc. 1233. The presumption is in favour of the agency of the wife, although it may be rebutted: *Paquin Limited v. Beauclerk*, [1906] A.C. 148; and see, at pp. 149-152, note of the judgment

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of Collins, M.R., in the Court of Appeal. There must be an express contract by the wife to pledge her own credit, otherwise the presumption is the other way. The *Paquin* case is not so strong in favour of the appellant as the case at bar. He also cited Bowstead on Agency, 4th ed., p. 38.

*M. L. Gordon*, for the plaintiffs, argued that the authority of a wife to pledge her husband's credit for articles of clothing does not extend to all kinds of dresses, however expensive, and that a person who is not a legal wife cannot make the husband liable even for necessities. He referred to *Debenham v. Mellon* (1880), 5 Q.B.D. 394, affirmed, 6 App. Cas. 24; *Kendall v. Hamilton* (1879), 4 App. Cas. 504, 514; Smith's Mercantile Law, 11th ed., p. 193. The *Paquin* case is distinguishable. He also cited *Seaber v. Hawkes* (1831), 5 M. & P. 549.

*Phelan*, in reply, referred to *Griffin v. Patterson* (1881), 45 U.C.R. 536.

September 30. RIDDELL, J. (after setting out the facts as above):—The essence of the learned County Court Judge's reasons is perhaps to be found in the following extract therefrom: "I think the case must be looked at as a case where two people, not married, go into Redferns, and she orders goods for herself. The only importance that can be attached to the fact that the plaintiffs believed that the two persons were husband and wife is on the question whether they gave credit to him, and to him alone. If this is the only matter to be considered, and the whole case must be treated as one coming under the ordinary head of principal and agent, I think the evidence fails to shew that the plaintiffs gave credit to any one except the person who bought the goods—that is, to Mrs. Inwood. They were bought by her, they were charged to her, an account was opened in her name, the goods were billed to her, and she did not pledge his credit. I think upon that state of facts it must be held that she is liable."

With the utmost respect, I am unable to agree with this conclusion.

The rule is laid down baldly in Bowstead on Agency, 4th ed., p. 38: "Where a man lives with a woman as his wife, she has implied authority to pledge his credit, during the continu-

ance of the cohabitation, to the same extent as if she were legally married to him."

This is, in my view, quite too broad a statement, and the cases cited in support of it do not go so far: *Watson v. Threlkeld* (1798), 2 Esp. 637; *Ryan v. Sams* (1848), 12 Q.B. 460; *Blades v. Free* (1829), 9 B. & C. 167. Nor do I think the statement in Cyc. quite accurate: "It is the cohabitation of a man and woman as husband and wife that is the basis of his presumed liability for her support:" 21 Cyc. 1233, cl. 12.

But it is not necessary in the present case to consider this. The facts are amply sufficient to bring the case within what I consider the true rule—a rule that has not been controverted in any of the cases and which is sound on principle. Where a man represents a woman to be his wife, and a third party acts upon that representation, the man is estopped from saying that she is not his wife. "His representation that she was his wife would have been conclusive against him:" *per* Lord Ellenborough in *Munro v. DeChemant* (1815), 4 Camp. 215, at p. 216. And where the defendant, having been married before, went through a ceremony of marriage with another woman (his wife living), "he was estopped to set up bigamy . . . he had given the woman . . . every appearance of being his wife:" *per* Lord Ellenborough in *Robinson v. Nahon* (1808), 1 Camp. 245, at p. 246. See also *Watson v. Threlkeld*, 2 Esp. 637.

A case in our own Courts is to the same effect, *Hawley v. Ham* (1826), Tay. 385, in which Campbell, C.J., says (p. 390): "The woman having been recognised by the defendant as his wife . . . renders him liable."

The learned County Court Judge, in his considered judgment, does not dissent from this view: but, assuming that the defendant Inwood would be in precisely the same position as though he and Mrs. Zimmerman had been lawfully husband and wife, he thinks credit was not given to Inwood but to the woman.

I can find no evidence to justify this view. There can be no doubt that the woman was thought by the plaintiffs to be Inwood's wife and was treated as such by them. It was just as

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in the ordinary case of a wife buying necessities for her own use. Then we have the visit of Inwood to introduce her, his accompanying her at least twice on her purchasing visits, his paying the account twice and promising to pay the balance—and also the fact that no inquiry was made as to the woman's means, no establishing of a line of credit for her—no one swears that the goods were furnished on her credit—the book-keeping entries, the charges, etc., are just such as, in the practice of the plaintiffs, are made in the ordinary case of a wife buying as agent of her husband; and so (even if not self-serving evidence) do not assist in shewing that the woman was the person credited.

In all the case I can find nothing to indicate that the defendant was buying or the plaintiffs selling on any but the credit of Inwood.

*Paquin v. Beauclerk*, [1906] A.C. 148, may be looked at on this question.

I am of opinion that the appeal should be allowed with costs, and the action dismissed with costs.

FALCONBRIDGE, C.J., concurred.

BRITTON, J., agreed in the result.

*Appeal allowed.*

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Sept. 30.

[DIVISIONAL COURT.]

WILSON v. SHAVER.

*Sale of Goods—Warranty—"Due to Calve."*

A cow bought by the plaintiff from the defendant was represented by the defendant as "due to calve" on a certain day:—

*Held*, that the words did not in themselves import a warranty that the animal was in calf; and, there being no evidence that the defendant understood the words in that sense, or knew that the plaintiff did, or that the expression had any technical meaning, an action for breach of the alleged warranty was dismissed.

Judgment of the County Court of the County of Halton reversed.

AN appeal by the defendant from the judgment of the County Court of the County of Halton.

The action was brought to recover damages for breach of an alleged warranty upon the sale of a cow, which was that she was



"due to calve" on a day stated. The plaintiff bought the cow at an auction sale of the defendant's stock, and it turned out that the cow was not in calf.

September 30. The appeal was heard by a Divisional Court composed of RIDDELL, MIDDLETON, and LENNOX, JJ.

*H. H. Shaver*, for the defendant, argued that the statement that a heifer was "due to calve" at a certain time did not amount to a guarantee that it was "in calf;" and referred to *Craig v. Miller* (1872), 22 C.P. 348, which was a stronger case in favour of the plaintiff than the present case. It was expressly stated at the sale that the defendant guaranteed nothing. Reference to *Hopkins v. Tanqueray* (1854), 15 C.B. 130.

*W. Laidlaw*, K.C., for the plaintiff, argued that the expression "due to calve," taken in connection with the different descriptions in the catalogue and the conversation at the sale, constituted a representation that the heifer was "in calf," on which a purchaser was reasonably entitled to rely: *Gee v. Lucas* (1867), 16 L.T.N.S. 357.

September 30. RIDDELL, J.:—The facts, so far as they are material, are as follows. The defendant is a breeder of Holstein and other cattle; and he advertised a sale of some of his stock. In the catalogue furnished to intending purchasers, a certain young cow was described as "due to calve" on a day stated. The plaintiff had, a short time before, visited the defendant's stock, and had been told by the defendant that this cow was "due to calve" on the said day. It is said that the auctioneer, at the opening of the sale, stated openly that the vendor did not give any guarantee; the plaintiff does not admit that such a statement was made, and we do not consider the alleged statement as a ground for this judgment.

The plaintiff bought the cow, and it turned out that she was not in calf. He brought an action for damages for breach of warranty, alleging that the representation "due to calve" was a warranty that the cow was in calf.

The County Court Judge gave effect to this contention, and caused judgment to be entered for the plaintiff. The defendant now appeals.

I think the appeal must succeed.

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I do not at all say that the words "due to calve" on a day named cannot import a warranty that the animal is in calf, if both parties understood it in that sense—or if the defendant knew that the plaintiff understood it in that sense—and the sale was made on that understanding. Nor could it be said that these words might not have such meaning in the business of dealing in such animals. But there is no evidence that either the defendant understood the words in that meaning, or knew that the plaintiff did, or that the expression has any technical meaning. We must then decide upon the words themselves.

I think all that the words imply is similar to what is found in the New English Dictionary, vol. III., p. 704, col. 2 (10), "reckoned upon as arriving," that is: "I expect the cow to calve on the day named; the male was admitted to her at a date which, in the ordinary course of nature, would, if she became pregnant, bring about parturition on that day named; I think she is pregnant, and reckon upon her having a calf upon that day."

The cow had been covered by the bull at the proper time; it is admitted that the defendant honestly thought she was in calf; the plaintiff and defendant had the same opportunity of judging of her condition; no one but a veterinary surgeon or other expert, and probably not even such person, could have told with anything like certainty whether the cow was in calf or not. I do not think that there was any such warranty as is contended for. While in all such matters good faith must be kept, purchasers, if they desire a warranty of pregnancy upon which they can rely, must look for one in different terms from the present.

The appeal must be allowed with costs and the action dismissed with costs.

MIDDLETON, J.:—It has been said that the decisive test in determining whether an affirmation was intended as a warranty is, whether the seller assumes to assert a fact of which the buyer is ignorant, or merely states an opinion or judgment upon a matter of which the seller has no special knowledge, and on which the buyer may equally exercise his own judgment. Applying this to the statement in this case, it may well be a warranty that the cow was bred to a bull at such a time that in the ordinary

course a calf might be expected at the date given; but, if it is attempted to carry the meaning beyond this, then the fact of pregnancy became a matter of opinion only, and there was no warranty.

LENNOX, J., concurred.

*Appeal allowed.*

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[LENNOX, J.]

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Oct. 3.

*Municipal Corporations—Local Option By-law—Repealing By-law—"Submission to Electors"—Voting—Non-compliance with Provisions of Municipal Act, 1903—Violation of Secrecy of Ballot—Effect on Result—Sec. 204 of Act—Right of Council to Submit New By-law—Discretion—Mandamus—Direction—Declaratory Judgment—Jurisdiction.*

Local option was adopted by a by-law of a town in January, 1906; and the town council submitted or purported to submit a repealing by-law to the electors on the 1st January, 1912. For the repealing by-law 1,268 ballots were cast and 1,393 against it:—

*Held*, upon the evidence, that at the voting upon the by-law there was an entire disregard of many of the most important provisions of the Municipal Act, 1903, relating to voting at elections and on by-laws, and particularly of those affecting the secrecy of the ballot, and that it could not be said that the result of the voting was not affected, within the meaning of sec. 204 of the Act.

As to secrecy, the aim of the statute is not alone that the voter *can conceal* his vote, but that while voting he shall not be in a position to disclose how he votes. To ignore the observance of the latter requirement would be to enable the bribed voter to prove himself entitled to the bribe.

*Held*, that it was entirely within the discretion of the town council to determine whether they would or would not submit another repealing by-law; and the Court would not grant a mandamus or direction to the council to submit a by-law.

*Held*, however, that the Court had jurisdiction to pronounce and should pronounce a judgment declaring that what took place on the 1st January, 1912, was not a *bonâ fide* submission of a repealing by-law, within the meaning of 6 Edw. VII. ch. 47, sec. 24(O.); and that the submission and vote thereon should not stand in the way of the submission of a new by-law before 1915.

Review of the authorities.

ACTION for a declaration that a by-law for the repeal of a local option by-law of the Corporation of the Town of Owen Sound was not submitted to the vote of the electors in the manner provided by law; that what was done should not stand in the way of submitting a repealing by-law in January, 1913; and for a mandamus or direction to the defendants or their council to submit a repealing by-law.

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June 17. The action was tried by LENNOX, J., without a jury, at Owen Sound.

*W. H. Wright*, for the plaintiff.

*R. W. Evans*, for the defendants.

October 3. LENNOX, J.:—In January, 1906, the Town of Owen Sound adopted local option by a by-law numbered 1172. This was before the enactment of 6 Edw. VII. ch. 47, sec. 24; and this by-law could, therefore, be repealed, by another by-law, on a bare majority vote.

On the 1st January, 1912, being the polling-day for the election of councillors, the Municipal Council of Owen Sound submitted, or purported to submit, a by-law, number 1494, for the repeal of their local option by-law.

There are fourteen polling subdivisions in Owen Sound; and in seven of these, contrary to the policy and direction of sec. 536 of the Municipal Act, 1903, there are more than 300 qualified electors: the lowest number being 316, and the highest 393.

In addition to the repeal by-law, there were several money by-laws to be voted upon, and there was a contest for election between about eighteen councillors and four or five school trustees. There was, therefore, likely to be, and there was in fact, a very heavy vote cast, in all some 3,400 votes. For the repeal by-law there were 1,268 counted ballots cast and 1393 against it. The repeal movement, therefore, failed.

Section 141 of the Liquor License Act, R.S.O. 1897, ch. 245, provides that a local option by-law shall not be finally passed until it has "been duly approved of by the electors of the municipality in the manner provided by the sections in that behalf of the Municipal Act;" and sub-sec. 6 of sec. 141, as enacted by 6 Edw. VII. ch. 47, sec. 24, provides that no such by-law shall be repealed "until after a by-law for that purpose has been submitted to the electors and approved by three-fifths of the electors voting thereon, *in the same manner* as the original by-law," etc.; "and in case *such repealing by-law* is not so approved, no other repealing by-law shall be submitted to the electors until the polling at the third municipal election thereafter. Provided that any by-law heretofore passed under sub-sec. 1 of this section may be repealed



with the approval of a majority of the electors voting upon such repeal."

Disregarding to some extent the exact language of the statement of claim, the plaintiff comes into Court to have it declared that the repeal by-law in question was not submitted to the vote of the electors in the manner provided for by the Municipal Act; that what was done does not, or at all events shall not, stand in the way of submitting a repealing by-law in January next; and for a mandamus or direction to the Municipal Council of Owen Sound to submit a repealing by-law.

Dealing first with the question of a mandamus, I am of opinion that, whether the plaintiff requires or is entitled to a declaratory judgment or not, he clearly is not entitled to this relief; and that, even if it is declared that a repealing by-law has not been submitted, within the meaning of the Act, it is still a matter entirely in the discretion of the council whether they will or will not submit a repealing by-law later on.

In 1906, the Legislature made it compulsory upon municipal councils to submit a local option by-law if petitioned for by twenty-five per cent. of the qualified voters of the municipality; but there is no corresponding provision, nor any provision of law, so far as I am aware, compelling a council to submit a by-law for the repeal of a local option by-law. As to "a direction," whatever that may mean, it is not the practice of the Court, I think, to give a direction which it cannot make effective. This branch of the relief asked for is refused.

Before dealing with the other branch of the plaintiff's case, upon the merits, I will dispose of the preliminary objection urged upon me, viz., that I have no jurisdiction to pronounce the declaratory judgment asked for. The Ontario Judicature Act, R.S.O. 1897, ch. 51, sec. 57, sub-sec. 5, provides that "no action or proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right, whether any consequential relief is or could be claimed or not." This is the same as the English Order xxv., Rule 5.

I am referred to: *Stewart v. Guibord* (1903), 6 O.L.R. 262; *Honour v. Equitable Life Assurance Society of the United States*, [1900] 1 Ch. 852; *Thomson v. Cushing* (1899), 30 O.R. 123; *Bun-*

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*nell v. Gordon* (1890), 20 O.R. 281; and *Barracrough v. Brown*, [1897] A.C. 615.

These cases do not sustain the objection taken. In *Bunnell v. Gordon*, it is true, the Court refused to declare that a woman whose husband was still alive was entitled to an inchoate right of dower; as the woman might die before her husband, her contingent estate could not be prejudiced in any way, and there could be no good purpose served by the declaration; but the case is important as shewing the opinion of Mr. Justice Ferguson as to the scope and meaning of the provision of the Judicature Act above quoted. Referring to the new provision, his Lordship says (p. 285): "The difference between the law as it was formerly and the present law on this immediate subject seems to be that the latter *enables* the Court to make a binding declaration of right whether any consequential relief is or could be claimed or not, whereas the former only *enabled* the Court to make a declaration when consequential relief was claimed or might have been claimed."

The only other of these cases that should be noticed is the *Barracrough* case. There, however, the defendants were not liable at all but for the express provision of a special Act, and this Act provided that the money payable should be recovered by summary proceedings in an inferior Court. The plaintiff, notwithstanding, sued in the High Court, and, failing because of want of jurisdiction, he then asked to have it declared that he was *entitled* to this money. This was the very point the inferior Court would have to determine, and a declaration of right was refused upon this ground.

On similar grounds, the Court refused to act in *Grand Junction Waterworks Co. v. Hampton Urban District Council*, [1898] 2 Ch. 331, where the Legislature directed the proceedings to be before a magistrate. And the same principle is recognised in our own Courts in *Attorney-General v. Cameron* (1899), 26 A.R. 103.

On the other hand, however, in *London Association of Ship-owners and Brokers v. London and India Docks Joint Committee*, [1892] 3 Ch. 242, although the principal claim advanced, an injunction, was refused, a declaratory judgment was pronounced. See, too, *Re Van Dyke and Village of Grimsby* (1909), 19 O.L.R. 402.

Upon the whole, with some reluctance, I have come to the conclusion that I have jurisdiction to pronounce a declaratory judgment of the character the plaintiff asks, if the facts justify it.

What are the facts? Summarised, they present a singular disregard of many of the most important provisions of the Municipal Act relating to voting at elections and on by-laws, and particularly of those affecting the secrecy of the ballot.

By sec. 145: "Every polling place shall be furnished with a compartment in which the voters can mark their votes screened from observation . . ."

By sec. 168: On receipt of a ballot; the voter is immediately to retire to the screened compartment and there vote, and before leaving the compartment fold the ballot so as to conceal his vote; and he shall then so handle his ballot paper as to preserve secrecy and give it to the Deputy Returning Officer; the officer shall see that it is the ballot he gave out, put it in the box, and the voter shall *at once* leave the room.

By sec. 169: "While the voter is in a balloting compartment for the purpose of marking his ballot paper, no other person *shall be allowed to enter the compartment, or to be in any position from which he can observe the mode in which the voter marks his ballot paper.*"

Section 170: No person shall take a ballot out of the polling-place.

Section 173: "During the time appointed for polling, no person shall be *entitled or permitted* to be present in the polling-place other than the officers, candidates, clerks or agents authorised to attend at the polling-place and the voter who is for the time being *actually engaged in voting*"—adding that there may be constables or peace officers in addition, if required.

Again, under the heading "Secrecy of Proceedings," we have secs. 198, 199, and 200.

Section 198 enacts that every officer, clerk and agent shall *maintain and aid in maintaining secrecy*—that no one shall interfere with a voter when marking his ballot or try to find out how he has voted or intends to vote—that no officer shall divulge any knowledge acquired at the poll. And for violation of any of the provisions of this section there is a penalty of as much as six months' imprisonment, with or without hard labour.

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By sec. 199, every officer, clerk and agent is to be *sworn to secrecy*.

And by sec. 200, no voter shall, in any proceeding to question the election, be required to state how he voted.

These are some of the provisions aiming at secrecy and an independent vote. These provisions, and others in words referring to an election, are, by sec. 351, made applicable to voting upon a by-law.

The evidence shews:—

Polling subdivision No. 1: A busy poll. A room for the returning officer. An average of fifteen to twenty persons there at a time. Two other rooms used as voting compartments. A table in one of these where the voter marked his ballot. The other supplied with three desks for the same purpose. As to this the witness said on cross-examination that the desks were about seven feet apart, and if a man wanted to mark his ballot secretly he could do it. There was no division between the desks.

Subdivision No. 2: A school-house. A class-room served for all purposes. Not more than eight or nine people in the room at one time. Two compartments were formed by a blackboard placed six feet from the wall, forming a lane, and this lane walled across in the centre by a map. This formed compartments of a sort, each open at the end. This opening was six feet wide, and without screen. This was in the morning. Later, as the witness puts it, they “made” three more compartments; but the making consisted in allowing the voters to mark their ballots on window-sills. These windows were three or four feet wide.

Subdivision No. 3: The officer was in a room behind a shop. Behind this was a kitchen, in size about nine by twelve feet. One witness said it was a little larger. There were three places provided in this kitchen for voting. One was in a corner, screened. It is said that the voter in this could be seen, but could avoid being seen. The other two voting places were a table and a stove. These points open from all sides. Usually—or often at all events—three voters voted in this kitchen at the same time.

Subdivision No. 4: This was in a dwelling-house. The Deputy Returning Officer occupied the kitchen. There were 212 votes cast. Said to have been “a rush of votes.” There was no attempt at providing screened compartments. A small room was behind



the Deputy's room. Two tables there. Voters marked their ballots at these. Usually two in this room at a time. There were doors leading from this room outside, which the voters could open. In addition, in the Deputy's room there were many places for marking ballots: on the sink, on the sideboard, and the walls. There was an average of from eight to fourteen persons in this room during polling. It is sworn that at times there would be in all as many as five voting at once; that the way persons were voting could be seen by people in the polling-place standing about.

Subdivision No. 5: One room used. Including officers and agents, about twenty persons in the room during voting. Great numbers voting at once, at one time, about noon, running up to eight or nine. At busy times marked their ballots anywhere—on window sills, desks, and the like. There were several witnesses as to this polling place. The Deputy Returning Officer swore. There were three illiterate voters. It was a busy time. Difficult to keep up. Began with four voting-places. Three other places adopted—"anywhere the voter could find a place." "Eight or ten at my desk at a time, and six or eight voting about the room. Nothing to prevent seeing a voter voting, but might not see how he voted."

Subdivision No. 6: No screens or compartments. Five or six voting, and as many waiting, at a time. Marked their ballots anywhere. Three illiterate voters. Deputy Returning Officer marked for one; and Alexander Wright, a scrutineer, and the other scrutineer, marked for the other two. About twelve or fourteen voting and waiting at times. Wright swears that some parties sat down at his desk to mark their ballot. When rush on, not told where to go.

Subdivision No. 7: The Deputy Returning Officer swears that until the middle of the day from five to thirty present. As many as eight or nine voting at once. A great many people, perhaps as many as twenty or thirty, present when these voted. There were two tables where ballots were marked, and other voters had to pass these, and could see, if they looked down. A scrutineer swore four tables provided for voting. School desks also used. Voters told to go anywhere. Possibly as many as ten voting at once. There were 302 votes polled. Nothing to prevent seeing

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how ballots were marked. Three or four illiterate voters' ballots marked right at the desk. Crowds standing around could see how these ballots were marked and hear what was said.

Subdivision No. 7a: Two compartments, but more than one voter allowed into them at the same time, and the vote there was sworn not to have been secret (see Karn's evidence). They voted also on desks, four or five at a time, and as many waiting to vote. Three illiterate voters. These ballots were marked at Deputy's table. There were men standing near who could see how these ballots were marked. It is sworn, too, that persons passing the compartments could see in. They selected any desks they liked.

Subdivision No. 9: Irregular. Want of secrecy, but an average of only eight or nine present.

Subdivision No. 10: Margaret Wright was in and out a good deal. Her mother, Mrs. Wright, came to vote, but left without voting. This lady came again, and her daughter Margaret says she stood by and saw the officer mark her mother's ballot, and that she could have seen how it was marked. Mr. Pearce swears he voted at No. 10. Others voting at the same time. Voted at table, and another voter at this table, too. They compared ballots. Four more waiting.

Subdivision No. 11: As usual, people were allowed to loiter. There is evidence of irregularities, but nothing serious, and I attach no great importance to them.

Subdivision No. 13: No adequate provision for secrecy. One of the voting compartments composed of chairs piled up, I do not know how.

Some evidence was called for the defence.

Johnston Little, a Deputy Returning Officer, said as to No. 6: There were no screens. The voters voted at tables, in corners of the room, and at desks. Going to some of these places, the voters passed others. Those passing could not see how ballots were marked, unless they looked over the other voter's shoulder. One ballot was marked for an illiterate by a scrutineer. It was impossible to give the time to carry out the Act. Half a dozen voting and half a dozen waiting at the same time. Used desks too. No attempt was made to keep voters away while others voted. Nothing to prevent the others from hearing how illiterates voted.

Alfred Atkins, Deputy in subdivision 7a, says two cloak-rooms, and voters also allowed to vote on desks. Quite possible for one voter to see how another voted. Poll twice too heavy.

Robert Morrow, Deputy at No. 4, swore that he sent the voters to the back room. Two places to vote there, but not divided off. When this was full (meaning, I suppose, when there were two voters in it), he told the other voters to go where they liked.

Mr. W. E. Raney, K.C., watched the proceedings during the taking of evidence, but did not ask to intervene. He desired, however, to be heard on the argument. I felt disposed to hear him, not with the idea that he had any *locus standi*—for there was no indication of bad faith on the part of the municipal council—but on account of the somewhat one-sided character of the proceedings; the plaintiff, backed no doubt by practically the entire anti-option vote, fighting with the utmost vigour, opposed by a municipal council representing, it is true, the local optionists, but, of necessity, representing the anti-optionists, as well.

I bear cheerful testimony to the absolute fairness, earnestness, and ability of the counsel for the defence; but it would not perhaps have been going too far if the municipal council had obviated the technical objection as to *locus standi* by associating with their counsel a counsel nominated by the local option vote; but I know a good deal could be said against this suggestion, too. Counsel for the plaintiff objected to Mr. Raney's being heard; counsel for the defence desired it; and it was arranged that, if I decided to allow him to take part in the discussion of the law—as it was all a question of law—he would file a written memorandum and furnish a copy to each of the counsel. This was done, because I concluded that he might very well be heard as an additional counsel for the defence—the defendants' counsel having, as I noticed, availed himself of Mr. Raney's friendly assistance at times during the trial and argument—and at all events as *amicus curiæ*. The plaintiff's counsel replied.

It is frequently said that in municipal contests and voting upon by-laws we must not look for literal compliance with every provision of the statute. I quite agree. There will always be cases arising in which, the provisions of the Act being, in the main,

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substantially complied with, the Courts will, even without reference to sec. 204, overlook isolated and trifling irregularities.

Section 204, which is, by sec. 351, made applicable to voting on by-laws as well, enacts that "no election shall be declared invalid . . . by reason of any irregularity, if it appears to the tribunal having cognizance of the question that the election was conducted in accordance with the principles laid down in this Act, and that such non-compliance, mistake or irregularity did not affect the result of the election."

This section clearly indicates the bounds beyond which I ought not to go. The onus of shewing that the omission, mistake, or irregularity did not affect the result is upon those who assert that it did not: *Re Hickey and Town of Orillia* (1908), 17 O.L.R. 317. There was no attempt made to prove that the result was not affected by the conditions which generally characterised this election; and, although there is a considerable difference in the votes pro and con, I am very far from being able to say that, with these conditions eliminated, and the statute complied with, the majority might not have been the other way.

But, at most, this is only a secondary consideration. The initial condition is, that the by-law is submitted, and the vote taken, in accordance with the principles of the Act. Without specific provisions at all, a ballot *per se* imports secrecy; and, when voting by ballot was adopted, the Legislature thereby wholly abandoned and repudiated open voting. With this, and the specific sections referred to, secrecy is now a basic principle of our municipal voting; and, if it is important in a municipal contest, it is vital in a vote upon a tense social question such as this.

It is not enough to say that the method pursued was just as good as, or even better than, the statutory method. It is the statutory method that gives meaning and validity to the vote. The vote without the statute is of no effect, is meaningless, binds nobody.

Almost every witness was asked, "Could the voters not conceal their votes if they wanted to?" That is not enough. The dangerous voter, the bribed voter, is the one who does not want to conceal his vote. The aim of the statute is not alone that the voter *can conceal*, but that while voting he shall not disclose—



shall not be in a position to disclose—how he votes. To ignore the observance of the latter requirement would be to enable the bribed voter to prove himself entitled to the bribe, and thus remove one of the greatest obstacles from the briber's path.

There was no evidence as to polling subdivision number 12. In all the others there were grave, if not gross, irregularities; and in eleven out of a total of fourteen subdivisions the voting, speaking of it generally, was characterised throughout by a flagrant, callous, and wholly inexcusable disregard of the plain provisions of the statute.

The irregularities are somewhat of the same class, but disregard of the law was far more general in this case than in *Re Hickey and Town of Orillia*, 17 O.L.R. 317; *Re Quigley and Township of Bastard* (1911), 24 O.L.R. 622; or *Re Service and Township of Front of Escot* (1909), 13 O.W.R. 1215.

It cannot be argued for a moment that the vote in this case was taken in accordance with the principles of the statute, or that there was an opportunity afforded for "a full, fair, and untrammelled vote of the electorate;" and I find that this vote was not so taken.

Nor can it be contended that what took place on the 1st January last was a *bonâ fide* submission of a repealing by-law, within the meaning of 6 Edw. VII. ch. 47, sec. 24, or—subject of course to the discretionary will of the council—that this so-called submission and vote stand in the way, or should be allowed to stand in the way, of the exercise of the people's franchise upon this question until January, 1915; and I find that it was not a *bonâ fide* submission or vote, within the meaning or intent of sec. 24.

I have not overlooked that, even with jurisdiction and sufficient evidence, as stated in *Austen v. Collins* (1886), 54 L.T.R. 903, and in other English as well as Canadian cases, it is not always advisable for the Court to pronounce a declaratory judgment where there can be no immediate result, or relief; but I am of opinion that this is a case in which the uncertainty incident to what has happened should not be allowed to continue.

There will be judgment for the plaintiff declaring that the repealing by-law in question was not submitted or voted upon in the manner provided for by the Liquor License Act and the Municipal Act, or according to law, and that the alleged vote upon the

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said by-law does not—or at all events shall not hereafter—prevent the Municipal Council of Owen Sound from submitting a by-law of this kind, in January next or thereafter, if they desire to do so.

There will be no costs to either party. The persons promoting the by-law, and with whom the plaintiff is, no doubt, identified, stood by and watched the irregularities without protest. The matter did not come upon them suddenly. It is said that the voting was very much as it had been. They, perhaps, were taking a double chance. The same thing may possibly be surmised as to the other side: at all events, if the voting was of the same character six years ago, when local option carried, then they too are without any very substantial ground for complaint, if the council decide that all must vote again.

If difficulty arises as to the wording of the judgment, I may be spoken to.

[A motion by one Millhouse, a ratepayer of Owen Sound, for leave to intervene and appeal, in his own name or in the name of the defendants, from the above decision, was made before MIDDLETON, J., and dismissed by him on the 26th October, 1912. See 4 O.W.N. 171.]

[IN CHAMBERS.]

## RE McLEOD v. AMIRO.

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Oct. 7.

*Mandamus—Division Court—Appeal from Magistrate's Conviction—Allowance upon Ground of Insufficiency of Information—Objection not Taken before Magistrate—Criminal Code, sec. 753—Decision on Merits, not on Preliminary Point—Jurisdiction—Review of Decision—Reopening Appeal—Consent—Duty of High Court.*

The Court will not make an order simply because all persons directly interested consent to such order or even ask for it.

The High Court of Justice may by mandamus command an inferior Court to hear a case within its jurisdiction; but where the inferior Court has decided a matter within its jurisdiction, however wrong the decision may be, mandamus does not lie to compel a reconsideration.

*In re Long Point Co. v. Anderson* (1891), 18 A.R. 401, 408, followed.

If the inferior Court determines a cause on a preliminary point without going into the merits, there is no real decision on the case, and mandamus will lie; but it must be clear that the point is preliminary in reality and not on the merits.

The defendant, who had been tried and convicted by a Police Magistrate for an offence against a statute, appealed to a Division Court, under sec. 749 (a) of the Criminal Code. The Judge presiding in the Division Court, upon objection taken by the appellant, allowed the appeal, on the sole ground that the information on which the conviction was based was insufficient. No objection to the information had been taken before the magistrate. Section 753 of the Criminal Code expressly provides

that no judgment shall be given in favour of the appellant upon an objection to the information and complaint not taken before the magistrate:—

*Held*, that the Judge's decision was not on a matter preliminary, but on the legal merits; and, even if he misconstrued sec. 753, he was acting within his jurisdiction.

*The Queen v. Justices of Middlesex* (1877), 2 Q.B.D. 516, applied and followed.

A motion by the informant, upon the consent of the defendant and the Judge, for a mandamus to compel the Judge to reopen the appeal, was refused.

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MOTION by Arthur McLeod, the informant, for a mandamus to the Judge of the County Court of the County of Frontenac, presiding in a Division Court, to compel him to reopen an appeal from a Police Magistrate's conviction, and hear and adjudicate upon the appeal.

The motion was made upon the consent of the Police Magistrate and the accused.

October 4. The motion was heard by RIDDELL, J., in Chambers.

*T. H. Peine*, for the applicant.

October 7. RIDDELL, J.:—McLeod laid an information against Amiro for operating his automobile on the highway contrary to the statute; the accused was tried before the Police Magistrate at Napanee and convicted, being fined \$10 and costs. No objection was taken before the Police Magistrate as to any defect in form or substance in the information.

An appeal was taken to the Division Court of the division, under sec. 749 (a) of the Criminal Code. The Division Court Judge (the Judge of the County Court of the County of Frontenac) sat to hear the case. Counsel for the appellant took objection to the information as insufficient in form and in substance. No evidence was taken; although counsel for the informant requested that the merits on the facts should be gone into, the Judge refused; and the appeal was allowed on the sole ground that the information was insufficient. It was not shewn (as indeed it could not be) that the objection had been taken before the magistrate—nor was it shewn or contended that Amiro had been deceived or misled.

A motion is now made for an order setting aside the order of the Division Court and "for an order of mandamus requiring the

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Judge . . . to reopen the appeal from the conviction . . .  
 and to hear the evidence of the . . . witnesses . . . and  
 to adjudicate upon the same, or for such other order as . . .  
 the justice of the case may require . . . .”

Amiro, through his counsel, consents: and a consent is also  
 filed signed by the learned Judge.

Contrary to the opinion which some seem to entertain, an  
 order is not made by His Majesty's Courts of Justice simply  
 because all persons directly interested consent to such order or  
 even ask for it. The Court must see whether the order is a  
 proper one to make; and is not to be made a mere convenience  
 for achieving some desired end.

Assuming all the facts to be as stated, I do not think mandamus  
 can issue.

No doubt, the High Court of Justice, exercising the powers of  
 the traditional Court of King's Bench, may by mandamus com-  
 mand an inferior Court to hear a case within the jurisdiction of  
 that Court. But where such Court has decided a matter within  
 its jurisdiction, however wrong that decision may be, mandamus  
 does not lie to compel a reconsideration. “In a matter within  
 his jurisdiction he may misconstrue a statute . . . or other-  
 wise misdecide the law as freely and with as high an immunity  
 from correction, except upon appeal, as any other Judge:” *per*  
*Osler, J.A., in In re Long Point Co. v. Anderson* (1891), 18 A.R.  
 401, at p. 408. See also what is said in *Township of Ameliasburg*  
*v. Pitcher* (1906), 13 O.L.R. 417.

It is, of course, contended in the present case that if the Court  
 below decides on a preliminary point without going into the  
 merits, there is no real decision on the case, and mandamus will lie.

No doubt—but we must be sure that the point upon which the  
 decision rested was preliminary in reality and not on the merits.

It is in the view that what the learned Judge decided was  
 preliminary, that both the applicant and his solicitor swear that  
 “there was no argument before the said Judge of the legal merits  
 of the case—the only question being argued was the question of  
 the insufficiency of the information and complaint.” And it is  
 pointed out that the Code (sec. 753) expressly provides that no  
 judgment shall be given in favour of the appellant upon an objec-  
 tion to the information and complaint which objection was not



taken before the magistrate. The learned Judge was, in my opinion, wrong in the view he took of the appeal (I am of course speaking only upon the material before me, and the facts may be quite different); but he has the same power to go wrong that any other Judge has.

That such a decision is not on a matter preliminary, but on the merits, is, to my mind, quite clear.

In *The Queen v. Justices of Middlesex* (1877), 2 Q.B.D. 516, the appellant had been convicted by a Police Magistrate in London for palmistry; he appealed to the sessions. Upon the appeal, the proceeding commenced with an objection by the appellant that the omission from the conviction of certain words made the conviction bad. The Justices, after hearing this point argued, decided in favour of the appellant, and they did not amend the conviction, as they should have done. They allowed the appeal. An application was made for a mandamus—and the motion came on before Mellor and Lush, JJ. Mellor, J., said (p. 519): "The principle has been very clearly stated . . . that a mandamus goes where persons having a jurisdiction to exercise decline to exercise it upon some matter preliminary to the hearing of the merits of the appeal, as regards fact or law . . . The question here is, did the sessions decline jurisdiction over this appeal? I am of opinion that they did not. . . . A conviction was brought before them, and objection was made that the conviction was bad because it omitted certain words. . . . That is really the substance of the objection. . . . They declined to amend, and they insisted upon deciding the appeal upon the conviction as it stood in point of form. . . . They have exercised their jurisdiction, and it is a cardinal rule when jurisdiction is vested in magistrates or any body of men, which they may exercise so long as they act within their authority, that however erroneously they decide, we cannot supervise their decision." Lush, J. (p. 520), came to the same conclusion with reluctance, "because I am not at all sure that the judicial mind of the learned Judge" (*i.e.*, the assistant Judge presiding at the sessions) "was applied to the construction of the statute. . . . But the question before us is whether the Court has decided the matter of the appeal. . . . They found the conviction bad on the face of it. That is a decision

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upon the legal merits of the case. If they decided upon the merits of the appeal, the legal merits, or the merits of the matters of fact, we cannot order them to rescind that decision. . . . Whether that decision is right or wrong, we have here no power to decide or inquire. It is nevertheless a decision. It is no more than saying, it is no use for us to hear the evidence. . . . Therefore this was not a preliminary objection. The sessions did not refuse to enter into the appeal on the ground of any preliminary matter. They did enter upon it and decide upon the legal merits of it."

In the present case the Court did enter into the appeal and "did decide upon the legal merits of it."

It makes no difference if the learned Judge misconstrued sec. 753 of the Code—he has the power, untrammelled by me, to make mistakes: and I can find no reason why a misconception of the meaning of a statute is any worse than a misconception of a common law principle or equitable rule.

If the statute was not present to the mind of the Judge—then his judicial mind was not "applied to the construction of the statute," just as in the case in 2 Q.B.D., already quoted from; and that can make no difference. It is no worse, as I have suggested, to fail to take into consideration a statutory provision than a well-established common law or equity principle. "In the hurry of business . . . the most able Judges are liable to err," says Lord Kenyon, C.J., in *Cotton v. Thurland* (1793), 5 T.R. 405, 409—and if Popham, C.J., could say of himself and his brethren as he did in *Sir Walter Raleigh's Case* (1603), 2 How. St. Tr. 18, "But we know the law," a greater than he has said, "God forbid that an attorney or even a Judge should be held to know all the law."

It would be going too far to assert a jurisdiction in this case to grant a mandamus—and considerations which should be elementary would have prevented the application being made.

"We are not to issue process here as instruments or conduits, pipes, but judicially as Judges:" *per* Holt, C.J., in *Lucy v. Bishop of St. David's* (1702), 7 Mod. 59. "A Court has no right to strain the law because it causes hardship:" *per* Lord Coleridge, C.J., in *Body v. Halse*, [1892] 1 Q.B. 203, 207. A Court "must look hardships in the face rather than break down the rules of law:" *per* Eldon, L.C., in the *Berkeley Peerage Case* (1811), 4 Camp. 401,

419. "We ought not to overstep our jurisdiction because we think . . . it might be advantageous so to do:" *per* Rigby, L.J., in *In re Watkins*, [1896] 2 Ch. 336, 339.

A total want of jurisdiction cannot be cured by the assent of the parties: *per* Patteson, J., in *Jones v. Owen* (1848), 5 D. & L. 669, 674; *The Golubchick* (1840), 1 Rob. Ad. Rep. 143, 147; *In re Thompson* (1861), 9 W.R. 203, 208, *per* Wilde, B.; and many other cases, especially *In re Aylmer* (1887), 57 L.J.Q.B. 168, *per* Lord Esher, M.R.

The motion must be dismissed. I have not considered whether, all parties consenting, the Court below cannot open up the matter *proprio motu*.

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[DIVISIONAL COURT.]

SIBBITT v. CARSON.

*Principal and Agent—Agent's Commission on Sale of Land—Contract—Time-limit—Sale Effected after Expiry—Introduction of Purchaser by Agent.*

The judgment of MIDDLETON, J., 26 O.L.R. 585, dismissing an action by a land agent to recover commission upon the sale of land for the defendants, was affirmed by a Divisional Court.

*Per* MULOCK, C.J.Ex.D., and RIDDELL, J.:—The plaintiff did not bring a purchaser within the time fixed by the contract of agency; and was, therefore, not entitled to commission.

*Per* CLUTE, J.:—Upon the evidence, it could not be said that the plaintiff brought a person who finally carried out the contract.

APPEAL by the plaintiff from the judgment of MIDDLETON, J., 26 O.L.R. 585.

October 10. The appeal was heard by a Divisional Court composed of MULOCK, C.J.Ex. D., CLUTE and RIDDELL, JJ.

*R. G. Code*, for the plaintiff. The learned trial Judge erred in finding that, at the time of closing the agreement of agency on Saturday the 24th February, 1912, the agency was limited in time and would expire on the following Monday at two o'clock p.m. No time-limit was agreed to when the contract of agency was completed on Saturday. The fixing of a time-limit expiring on Monday the 26th February at two o'clock p.m. occurred to the defendant Bingham some time during the forenoon of Monday, and was prompted only by certain telephone messages received by him indicating that the property in question was commencing

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to attract attention. I refer to *Singer v. Russell* (1912), 25 O.L.R. 444; *Wilkinson v. Alston* (1879), 48 L.J.Q.B. 733; *Stratton v. Vachon* (1911), 44 S.C.R. 395; *Travis v. Coates* (1912), 27 O.L.R. 63.

*George F. Henderson*, K.C., for the defendants, was not called upon.

October 10. MULOCK, C.J.:—In the opinion of myself and my brother Riddell, the plaintiff was bound to have brought a purchaser on or before two o'clock. His agency ceased at that hour. He did not bring a purchaser within that time. Therefore, he did not earn his commission. The circumstance that a man who had been negotiating with him, subsequently introduced a third person to go in with him and become purchaser jointly with him, is not, in our opinion, obtaining a purchaser before two o'clock. There was a very distinct contract between the parties. They all knew of the significance of two o'clock; they knew that term to be material—that was the contract. And in that respect this case differs from the authorities cited, where there was no time-limit when an agency was created, and subsequently, as a result of the agency, the owner himself concluded negotiations begun by the agent. The majority of the Court rest their judgment upon the contract itself; and for that reason we think the plaintiff cannot succeed.

CLUTE, J.:—I agree in the disposition of this case, but I should have required further time to consider if it were the fact that the final purchaser actually carried out the agreement, he having been introduced by the agent; but, as a matter of fact, Grant, who was first introduced and who became one of the purchasers, was not the final purchaser. He and his associate, according to the evidence, became the purchasers. If that is so, then the agent did not introduce a person or persons who became the purchaser; and there is no evidence at all that Grant would have become a purchaser if he himself had not found the person who was willing to join with him in an equal interest. The introduction of the third party broke the continuity of the previous negotiations; and, therefore, it could not be said that the agent brought a person who finally carried out the contract.



RIDDELL, J.:—I agree in the result; and, speaking for myself, I have no manner of doubt that the owner of property can simply "sit tight," knowing that some purchaser is negotiating with his agent, and, seeing the two quarrel, say: "I have agreed with this agent that if he bring me a purchaser by a fixed time he is to have his commission, and I am not going to interfere; buy or not, just as you please"—and then, when the purchaser fails to complete his contract by the fixed time, deal with that purchaser. It would be preposterous if the liberty a man has to deal with his own property should be limited in the manner which has been suggested. Of course good faith must in all cases be preserved.

MULOCK, C.J.:—The appeal will be dismissed with costs.

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[DIVISIONAL COURT.]

RE DICKSON CO. OF PETERBOROUGH AND GRAHAM.

*Landlord and Tenant—Proceeding to Eject Overholding Tenant—Landlord and Tenant Act, 1 Geo. V. ch. 37, Part III.—Order of County Court Judge "Dismissing Application"—Refusal of Writ of Possession—Appeal under sec. 78(1)—Termination of Tenancy—Conflicting Evidence—Duty of Judge—Refusal to Determine Question—Powers of Judge and of Divisional Court—Leave to Bring Action—Discharge of Order.*

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After the termination of a tenancy, the landlords applied to a County Court Judge to make the inquiry provided for in sec. 75 of the Landlord and Tenant Act, 1 Geo. V. ch. 37, Part III., relating to overholding tenants. The Judge gave an appointment, all parties appeared, and, with their witnesses, were heard. The Judge made no specific finding; and, instead of issuing a writ of possession or specifically refusing to do so, made an order dismissing the application of the landlords:—

*Held*, that the application to the Judge was in substance an application for a writ of possession; his refusal to decide was in effect a refusal of a writ of possession; and an appeal lay from his order to a Divisional Court under sec. 78(1).

*Held*, also, that it is now competent for and the duty of the County Court Judge to determine the question of tenancy, and the termination of it; and this he may do on conflicting evidence.

*Re St. David's Mountain Spring Water Co. and Lahey* (1912), 4 O.W.N. 32, followed.

*Held*, also, that it is not for the County Court Judge to decide whether the right of the tenant should be determined under the Act (Part III.), but for the appellate (Divisional) Court: sec. 78(2).

And *held*, upon the facts of this particular case, that the right to possession should not be determined in a proceeding taken under Part III.; and the order of the Judge should be discharged, and the landlords left to proceed by action for the recovery of possession.

Suggested, *per* LENNOX, J., that the right of refusal to proceed might well be conferred by the Legislature upon the County Court Judge.

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APPEAL by the company from an order of the Judge of the County Court of the County of Peterborough, made in a proceeding under Part III. of the Landlord and Tenant Act, 1 Geo. V. ch. 37, relating to overholding tenants.

Graham had been a tenant of hotel premises in Peterborough, the company being his landlords. After the termination of the tenancy, the company applied to the County Court Judge to make the inquiry provided for in sec. 75 of the Act. The Judge gave an appointment, and all parties appeared. The parties and their witnesses were heard, and counsel were heard in argument. The facts were in dispute, and the Judge made no specific finding; but, instead of issuing a writ of possession, or specifically refusing to do so, he ordered "that the application of the landlords be and the same is hereby dismissed with costs."

October 3. The appeal was heard by <sup>r</sup>a Divisional Court composed of RIDDELL, KELLY, and LENNOX, JJ.

G. H. Watson, K.C., and E. L. Goodwill, for the appellants, relied upon their rights under the lease between the parties which had terminated, and the Landlord and Tenant Act, 1 Geo. V. ch. 37. The alleged agreement for a new lease was conditional only, and not binding on the appellants. They referred to the following authorities: *Re St. David's Mountain Spring Water Co. and Lahey* (1912), 4 O.W.N. 32; *In re Lumbers and Howard* (1905), 9 O.L.R. 680; *Moore v. Gillies* (1897), 28 O.R. 358; *Ryan v. Turner* (1904), 14 Man. L.R. 624; *Re Grant and Robertson* (1904), 8 O.L.R. 297; *Re Graham and Yardley* (1909), 14 O.W.R. 30; *Re Fee and Adams* (1910), 1 O.W.N. 812; *Re Broom and Godwin* (1910), 2 O.W.N. 125. The right of appeal under sec. 78 is not limited as contended by the respondent.

I. F. Hellmuth, K.C., and F. D. Kerr, for the respondent, objected that no appeal under sec. 78 lay from the decision of the County Court Judge; but, owing to the view of the case taken by the Court, they were not called upon to argue.

October 10. RIDDELL, J.:—Graham had been a tenant of certain premises in Peterborough, his landlords being the company. After the termination of that tenancy, the landlords applied to the County Court Judge to make the inquiry provided for in sec. 75 of the Act 1 Geo. V. ch. 37. The learned Judge gave an

appointment under sec. 75 (2), and all parties appeared (sec. 77 (2)). The parties and their witnesses were heard and argument had—and the learned Judge, instead of issuing a writ of possession or specifically refusing to do so, made an order in the following terms: “It is ordered that the application of the landlords be and the same is hereby dismissed with costs to be paid forthwith after taxation thereof by the landlords to the tenant.”

His reasons for doing so are as follows:—

“The tenant has been for nineteen years and still is in possession of the Oriental Hotel, Peterborough, as tenant of the landlords or their predecessors in title. His lease expired on the 1st May, 1912, and he now holds possession—the landlords say wrongfully, he says rightly and pursuant to a new agreement for further tenancy. Negotiations were undoubtedly entered into and their effect reduced to writing—a small memorandum only—by Mr. Gordon, at that time acting as solicitor for the tenant. This writing has been lost or mislaid by the landlords or their manager. This is not very important, however; there being little, if any, dispute as to the nature and contents. The tenant says it was an absolute and binding bargain, to be reduced into a formal lease; the landlords contend that it was tentative only, and conditional on the assent of other parties not then present. A lease was subsequently tendered by the landlords for signature by the tenant, which differs materially from the terms contended for by either party as the result of the meeting and negotiation mentioned.

“The evidence is very contradictory, and not, in my mind, wholly reconcilable.

“In summary proceedings such as this, the case must certainly be ‘clearly’ made out before an order is made. The word in the former statute seems superfluous—an ample reason for its omission in the late revision. This is a summary proceeding, conferring unusual and extraordinary powers, which is another cogent reason for the strict construction of the statute, and for requiring the landlords to shew clearly and undoubtedly that the order for possession should be granted.

“The word ‘wrongfully’ is still an essential part of the statute. This adverb seems, as said by Boyd, C., in *Re Snure and Davis* (1902), 4 O.L.R. 82, 87, to be used emphatically, and must be satisfactorily and adequately met by the applicants, the landlords.

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"I am not referred to, neither can I find, any case under the new Act as to the method of its construction or application.

"In view of the fact that there may—probably will—be further litigation in another Court (but with proper pleadings and discovery) between these same parties, on the same facts and the same evidence, I do not think it fair that I should either assist or prejudice any party or witness by a specific finding on the facts in controversy or any of them."

The landlords appeal.

It was objected that no appeal lies under these circumstances, as sec. 78 (1) gives an appeal only "from the order of the Judge granting or refusing a writ of possession;" and it was contended that here the Judge had done neither.

We think that the application to the County Court Judge, whatever its form, was in substance an application for a writ of possession; and that his refusal to decide was in effect a refusal of a writ of possession. Consequently, we consider that an appeal lies.

I agree with what is said by my brother Britton in *Re St. David's Mountain Spring Water Co. and Lahey*, 4 O.W.N. 32, at p. 35: "It is competent for and the duty of the County Court Judge to determine the question of tenancy, and the termination of it, and . . . the Judge may do this on conflicting evidence." The judgment of the other members of the Court in that case implied an agreement by them in that statement of the law.

It is now the duty of the County Court Judge to determine whether the tenant "wrongfully holds against the right of the landlord:" sec. 77 (2); and no colour of right set up by the tenant justifies him in declining to exercise his statutory duty. He need not fear that in a proper case his decision will be final, even if that were a sufficient reason for failing to decide—which, of course, it is not.

And it is not for the County Court Judge to decide whether the right of the tenant should be determined under the Act in question—that function is vested in the Divisional Court (sec. 78 (2)), and not in the County Court Judge.

Nor can it be said that the proceeding before the County Court Judge is summary—if at all events by "summary" is meant the depriving of tenant or landlord of the opportunity of full



disclosure, full evidence, exhaustive argument, or of the benefit of all the law applicable to the case. A County Court Judge, in my opinion, has much more important duties to perform than those under this Act: for example, he may in a "summary" way determine facts which may land a man in a penitentiary for a long term of years.

There is no anomaly in a trial Judge not having the power of a Divisional Court in appeal: every day at *nisi prius* we are compelled to accept verdicts with which we are dissatisfied, but with which we cannot interfere—these are often set aside by the Divisional Court.

Were the law the same as formerly, there are many decisions shewing that the course pursued was right, but the decisions on a different state of the law are not of authority.

If then there were no more in the case than the refusal of the learned Judge to determine the rights of the parties, we should allow the appeal, and send the case back to be disposed of on the merits.

But we are of opinion that the right to possession in this particular case should not be determined in such a proceeding. We need not set out the reasons more fully than they are given as reasons for his own decision—or want of it—by the County Court Judge.

The Act, sec. 78 (2), gives us the power "to discharge the order of the Judge, and the landlord may in that case proceed by action for the recovery of possession." It is argued that there is no necessity for setting aside the order. Perhaps so; but, on the other hand, if we omitted to do so, it would probably be argued by the tenant that no action lay—"expressio unius est exclusio alterius," etc., etc., etc. To avoid any possible difficulty and doubt, the order will be set aside—costs here and below to be costs in any action to be brought by the landlords for possession. If no such action is brought within thirty days, the costs aforesaid to be paid by the landlords. The County Court Judge will not take any further steps in the matter without the consent of both parties.

KELLY, J.:—I agree.

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LENNOX, J.:—I agree in the result arrived at by my brother Riddell. But, while it is quite clear that, as the law is, it was contrary to the statutory duty of the learned County Court Judge to stay his hand, even for the cogent reasons set forth in his judgment, and in order that the questions in issue between the parties might be determined in exactly the way in which, in the unanimous opinion of this Court, these issues ought to be determined, yet it might be worth while for the Legislature to consider whether, where the Judge is of opinion that the issues cannot be safely or properly tried before him—as was the case in this instance—the right of refusal to proceed ought not to be conferred upon a County Court Judge called upon to act under the overholding provisions of the Landlord and Tenant Act. The proper mode of trial is being reached in this case by an unintentional infraction of the provisions of the Act. It will be more satisfactory if in the future the proper method of trial is secured, in each case, under the provisions of the Act.

*Order accordingly.*

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[IN CHAMBERS.]

RE BAYNES CARRIAGE CO.

1912

Oct. 15.

*Evidence—Witnesses on Pending Motion—Production of Documents—Con. Rules 448 et seq., 490-492—Company—Winding-up—Petition—Dismissal—Previous Decision.*

It is the duty of a person under examination as a witness upon a pending motion to produce (if called upon) all books, papers, and documents which he would be bound to produce at the trial: *Con. Rules 448 et seq., 490, 491, 492.*

Where a witness, put forward by a party to a proceeding, makes certain statements under oath, and it is desired to shew by his own books, or those of the person who puts him forward, that his statements are untrue, the books must be produced to test his accuracy; when he is under cross-examination, they will be used for that purpose, and to prove that his evidence is not to be relied upon. But where a party desires to obtain evidence upon a motion, and subpœnas a person to give it, he cannot compel him to produce books, etc., to add to what he is to say—or to enable him to become possessed of facts not within his knowledge.

*Alexander v. Irondale Bancroft and Ottawa R.W. Co.* (1898), 18 P.R. 20, *Russell v. Macdonald* (1888), 12 P.R. 458, and *In re Emma Silver Mining Co.* (1875), L.R. 10 Ch. 194, distinguished.

*Re Baynes Carriage Co.* (1912), 27 O.L.R. 144, is decisive against a motion to dismiss the petition for the winding-up of the company, and of the right to examine the witnesses sought to be examined in support of the petition.

MOTION on behalf of the petitioners in a winding-up proceeding for an order that the vice-president and secretary of the company should, upon their examination as witnesses on the pending motion to wind up the company, produce the books of the company and the statements, etc., of the auditors of the company, and "all other documents and papers in writing of the said company which may be called for on their examination, and that the said company do produce such books, papers, and documents;" and motion by the company to dismiss the petition.

October 11. The motions were heard by RIDDELL, J., in Chambers.

*Grayson Smith*, for the petitioners.

*H. A. Burbidge*, for the witnesses and the company.

October 15. RIDDELL, J.:—Upon the argument, much was said by counsel opposing the motion as to the want of good faith on the part of the petitioners or one of them, the fatal defects in the petition, etc., etc. But with all that I have nothing whatever to do. The Chancellor has decided that these witnesses may be examined in this proceeding (ante 144); and, so long as that order stands, it must be held that the examinations are proper. See also *Re McLean Stinson and Brodie Limited* (1911), 2 O.W.N. 435.

Whatever may be the rule in England, our Con. Rules make it the duty of a person under examination to produce (if called upon) all books, papers, and documents which he would be bound to produce at the trial: Con. Rules 448 *et seq.*, 490, 491, 492. These Rules have been in existence, in substance, for years.

I do not think that the order can be made as asked.

*Alexander v. Irondale Bancroft and Ottawa R.W. Co.* (1898), 18 P.R. 20, relied upon by the applicants, is against them. The Divisional Court there reversed a judgment of Mr. Justice Rose, first in form, saying that the subpœna should not be set aside *save* in exceptional cases, and second on the merits, because they "differed from Rose, J., in their view of the facts disclosed by the affidavits, from which they drew the inference that the railway company had kept no books of their

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own, but the accounts of the company were kept in the private books of Pusey," the president, then under examination. This does not at all decide that the president could be compelled to produce the books of the company, but rather the reverse is indicated.

Nor does *Russell v. Macdonald* (1888), 12 P.R. 458, advance matters. It simply follows the principle of *In re Emma Silver Mining Co.* (1875), L.R. 10 Ch. 194.

In the *Emma* mine case, the secretary, W. H. Tooke, had been put forward by the company in a winding-up proceeding to make an affidavit in answer to the petition, which he did. He was cross-examined on his affidavit, and on his cross-examination was served with a notice to produce the books of the company—this he refused to do. A motion was made before Malins, V.-C., and that learned Judge ordered "that the . . . company, by Mr. W. H. Tooke, their secretary, produce before the special examiner . . . upon the cross-examination of the said W. H. Tooke on his affidavit made in these matters on behalf of the said company, and as their secretary . . . all the books and papers mentioned in the notice to produce . . . or such of the said books and papers as may be in the possession or power of the . . . company." An appeal was had to the Lord Justices. They sustained the order on a simple ground. James, L.J., said: "It is not a question of discovery at all. It is an ordinary order for the production of documents on the cross-examination of a witness. . . . The power of making such an order exists in this Court in the same manner and with the same restrictions as in a Common Law Court in an action at *nisi prius*. A witness having been called, it is desired to test his evidence by cross-examination, and for that purpose it is desired to put in his hand, books, papers and documents, either in his own control or in that of the party to the cause in whose behalf he is examined. The Vice-Chancellor has made an order in this case, that the books must be produced that they may be dealt with as if before a Judge and jury at *nisi prius*. It is clear that there is to be a limit to the power of inspection . . . they are to be dealt with as at a trial at *nisi prius*." Mellish, L.J., said:



“It is impossible to say . . . that none of the books can be of any use in the cross-examination of this witness. In his affidavit he has sworn to some things which he cannot know except from the books. He is cross-examined as to them; he appeals to the entries in the books. It is idle to contend that what he has said is not to be tested by the books. . . . To what extent he” (*i.e.*, the petitioner) “is entitled to use them cannot be decided till the course of the cross-examination is known.”

The principle is obvious—a party to a proceeding puts forward a witness, who makes certain statements under oath; it is desired to shew by his own books, or those of the person who puts him forward, that his statements are not true. Such books must be produced to test his accuracy; when he is under cross-examination, they will be used for that purpose, and to prove that his evidence is not to be relied upon.

The case before Mr. Justice MacMahon (*Russell v. Macdonald, supra*), was similar. On a motion being made for an injunction to restrain Macdonald from receiving moneys in respect of his interest in the firm of A. F. M. & Co., an affidavit by his partner, A. F. M., was filed on behalf of the defendant. A cross-examination was had of A. F. M. upon his affidavit, and he “was unable to answer a number of the questions because he had not the firm’s books, which could alone explain the defendants’ position in regard to the partnership assets and liabilities.” The learned Judge made an order for the production of such books on the cross-examination.

These cases are far from deciding that where a party desires to obtain evidence upon a motion, and subpœnas a person to give such evidence, he may also compel him to produce books, etc., to add to what he is to say—or to enable him to become possessed of facts not now within his knowledge.

I think the motion must be refused, with costs payable forthwith, as the witnesses are not parties to the petition.

I am, by the company, asked to dismiss the petition. This I cannot do. The Chancellor’s judgment implies the validity of the petition. If the petition were of such a character as that it could be dismissed for the reasons advanced now by the com-

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pany, it was so when the matter was before the Chancellor. If the grounds were not taken or brought to the attention of the Chancellor, the fault does not lie with the Court.

I do not dismiss the petition, but enlarge the hearing of it *sine die*; either party to bring it on, on two days' notice. Costs of this enlargement to be to the petitioners in any event.

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## ROBINSON V. OSBORNE.

*Limitation of Actions—Possession of Land—Successive Intruders—Break in Occupation—Absence of Writing to Shew Transfer of Claim—Ejection—Proof of Plaintiff's Title.*

Where, in an action to recover possession of land, the defendant relies upon the Limitations Act and sets up the possession of himself and several prior intruders, it is not necessary for him to shew a conveyance or writing transferring the claim of one intruder to another; but he must clearly establish that these trespass occupants have followed each other in close succession, in an unbroken chain, the one coming in as soon as the other went out, during the time the statute was running. If there has been any interval, during that interval the law refers the possession to the real owner having title. And, where there was a gap of a whole year, it was *held*, that the defence of the statute had not been made out.

*Trustees Executors and Agency Co. v. Short* (1888), 13 App. Cas. 793, and *Handley v. Archibald* (1899), 30 S.C.R. 130, applied and followed. The plaintiff, having proved possession by his predecessor in title, had given sufficient *prima facie* evidence of a fee simple.

Judgment of the Judge of the County Court of the County of Halton affirmed.

AN action in the County Court of the County of Halton, to recover possession of the east half of lot 10, north of Ontario street, east of the river, in the village of Bronté, in the possession of the defendant. The defence was the Statute of Limitations.

The action was tried before the Judge of the County Court, without a jury; and the following reasons for judgment were given in writing:—

I find that the plaintiff proved sufficient paper title in himself to entitle him to have the actual and visible occupation of the land described in the plaintiff's statement of claim, if such title and right have not been extinguished under the statute.

That the defendant has failed to prove actual, continuous, open, visible, and exclusive occupation of the said land, either by himself or those under whom he claims, in succession, for a period of ten consecutive years.

That, if there were ten consecutive years of such occupation adverse to the possession of the plaintiff, such occupation could only be made out by uniting the occupation of some two or more of the plaintiff's predecessors, or by uniting Dobson's occupation with the defendant's; and the defendant failed to prove a conveyance or transfer of any kind of such occupation or possession from Pollock to Thomas, Thomas to Triller, Triller to Dobson, and Dobson to himself.

On these findings judgment will be entered for the plaintiff, that he, the plaintiff, is entitled to possession of the said land as against the defendant, and that the defendant give up such possession to the plaintiff, and pay the plaintiff's costs of action.

The defendant appealed.

October 2. The appeal was heard by a Divisional Court composed of RIDDELL, KELLY, and LENNOX, JJ.

W. *Laidlaw*, K.C., for the defendant, argued that the plaintiff had failed to prove a paper title; for, though he had put in a deed to his predecessor dated in 1871, he had failed to prove that the vendor was in possession at that date. Even if the plaintiff's paper title should be admitted, there is evidence that there has been such a discontinuance of possession on his part as entitles the defendant to succeed. He referred to *McConaghy v. Denmark* (1880), 4 S.C.R. 609, *per* Gwynne, J., at pp. 632, 633, where the decisions are summarised; *Simmons v. Shipman* (1887), 15 O.R. 301; *Trustees Executors and Agency Co. v. Short* (1888), 13 App. Cas. 793; *Willis v. Earl Howe*, [1893] 2 Ch. 545: [RIDDELL, J., referred to Armour on Titles, 3rd ed., p. 307]; *Samuel Johnson & Sons Limited v. Brock*, [1907] 2 Ch. 533, *per* Parker, J., at p. 537; *Perry v. Clissold*, [1907] A.C. 73, *per* Lord Macnaghten, at p. 79.

J. P. MacGregor, for the plaintiff, argued that the trial Judge had properly found the plaintiff's paper title made out. The Statute of Limitations is extinctive, not acquisitive, in its

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general scope, and the defendant cannot rely upon the possession of a succession of trespassers between whom no connection is shewn, to establish his title. The *Short* case is a binding authority in the plaintiff's favour. He referred to *Doe Baldwin v. Stone* (1849), 5 U.C.R. 388; *Allison v. Rednor* (1857), 14 U.C.R. 459; *Young v. Elliott* (1864), 23 U.C.R. 420; *Kipp v. Synod of Toronto* (1873), 33 U.C.R. 220; *Handley v. Archibald* (1899), 30 S.C.R. 130. The evidence shews that the possession relied on by the defendant was interrupted within the statutory period. The defendant fails to shew any possession in Dobson, and there is a gap in the chain of possessory owners which is fatal to his claim.

October 15. RIDDELL, J. (after setting out the facts as above):—The lot in question lies to the west of lot No. 9, which is frequently mentioned in the evidence.

The plaintiff's mother, in 1871, received a deed of the east half of lot 10 from one Croker, paying \$40 as consideration, and he had received a quit-claim deed in 1868 from Celista M. McNeil. These grantors had been in possession, and she went into possession and lived on the lot till about 1875. She then moved to Dundas, then to Oakville, then to Toronto, where she died in 1889, never having been upon the lot in the meantime. The plaintiff is her administrator, as well as grantee of her heirs-at-law.

When she left the lot with her family, she placed it in the care of her brother, John Riggs, who himself died in 1901. There was a house at that time on the lot, and this was rented by Riggs to tenants. It did not seem to pay—the tenants did not pay—and Riggs had the house removed about twenty-five years ago; this was after the last tenant, one Cullen, had partly burned it down, and it had become uninhabitable. No one on behalf of Mrs. Robinson went on the property after that time.

The learned County Court Judge has not favoured us with his view of the credibility of the witnesses; counsel for the plaintiff (p. 39) says expressly that he is not disputing the honesty of Pollock, Sargeant, Speers, or Dobson. The evidence is very contradictory as to the fencing in of this lot with the adjoining lot 9. Applying the best judgment I have, and remembering the



onus of proof, the following are my conclusions as to the facts succeeding the occupancy of Mrs. Robinson:—

William Pollock bought lot 9 in 1892, and got his deed in 1896. He went into possession of lot 9, and tore up an old picket fence between 9 and 10, replacing it by a wire fence. This fence I think it is that the plaintiff's witnesses speak of. Pollock made no use of lot 10, but he had a tenant, Thomas, to whom he sold lot 9 in 1896, and Thomas took down the fence and put it at another place, at least much of it. Thomas used lot 10, ploughed it in 1897, planting potatoes that year and potatoes and corn the following year, with one Sargeant. In 1899, Thomas sold to Triller, who pastured his horses in this lot, which was not at least wholly separated from No. 9, and in 1910 he sold to Dobson; Dobson himself never went on the lot or exercised any acts of ownership thereon, but rented lot 9 to one Hart. Hart never went on lot 10 to use it—never attempted to use it—and he left 9 after having been in possession for a year or a little more. Then the defendant came in possession of 9, and took possession of the east half of lot 10, tearing down the remains of the old wire fence between the two lots, and cultivating them together. It would seem that Pollock made some kind of an indefinite claim to this lot, as Camp, Triller's tenant, thought his tenancy covered it, as well as "the old Pollock property." And, though all the conveyances speak of lot 9 only, Dobson, when he bought lot 9, thought he was also getting a claim to lot 10; and, beyond question in my mind, he intended to sell and the defendant to buy not only lot 9, but also a claim to the east half of lot 10.

If Dobson's possession had been such as to answer the statute, I think the defendant could take advantage of it, even though his deed covered lot 9 only.

In *Simmons v. Shipman*, 15 O.R. 301, H. had lived on the land and worked it for thirteen or fourteen years; he then sold to D., and went off the land; possession was forthwith taken by D. Mr. Justice O'Connor, at the trial, ruled that there was a break in the continuity of possession, because no writing passed between H. and D. with reference to this land. But the Divisional Court held that this was error, and that an actual

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transmutation of possession for value was enough—that there was no need of deed or writing. To the same effect is *Burroughs v. McCreight* (1844), 1 Jo. & Lat. 290, at p. 303: “It is not necessary that this possession should be strengthened or corroborated by intermediate conveyances. The Act speaks of possession without reference to conveyances.”

*Dixon v. Gayfere* (1853), 17 Beav. 421, and *McConaghy v. Denmark*, 4 S.C.R. 609, may also be looked at.

The attention of the learned County Court Judge does not seem to have been directed to this feature of the evidence.

The learned Judge, in my opinion, misconceives the law.

In *Trustees Executors and Agency Co. v. Short*, 13 App. Cas. 793, it was held that the Act does not continue to run against the rightful owner after an intruder has relinquished possession without acquiring title under the Act; and thereafter it was by many considered that “the doctrine has now been exploded that the paper title may be extinguished by a succession of independent trespasses, without any one of the intruders having been in possession for the statutory period.” Armour on Titles, 3rd ed., p. 306. But the doctrine and the case in 13 App. Cas. came under consideration in *Willis v. Earl Howe*, [1893] 2 Ch. 545, and *Samuel Johnson & Sons Limited v. Brock*, [1907] 2 Ch. 533, and the decision was shewn to be based upon the ground “that the old right of action was gone when the first intruder went out, and that a new right of action arose when the fresh intrusion occurred:” *per* Parker, J., in [1907] 2 Ch. at p. 538. If, however, the new intruder came in immediately, there was no advantage under the statute or otherwise to the real owner from the old intruder going out. The law is as laid down by Sir Henry Strong, C.J., in *Handley v. Archibald*, 30 S.C.R. 130, at p. 137: “The statute does not run against a party out of possession unless there is a person in possession: *Smith v. Lloyd* (1854), 9 Ex. 562; *McDonnell v. McKinty* (1847), 10 Ir. L.R. 514; and further, if there has been a series of persons in possession for the statutory term between some of whom and their predecessors there has been no privity, in such case the bar of the statute is complete, but if there has been any interval between the possession of

such persons then inasmuch as during that interval the law refers the possession to the real owner having title, the benefit of the former possession of a precedent wrong-doer is lost to a trespasser who subsequently enters, in whose favour the statute consequently runs only from the date of his own entry: *Trustees Executors and Agency Co. v. Short*, 13 App. Cas. 793. And this rule is not affected by the old common law principle that in case of disseisin there could be no remitter without actual entry, inasmuch as the statute does not deal with feudal possession or seisin but with actual or constructive statutory possession as distinguished from seisin."

If then the defendant could prove a continuous occupation adverse to the owner, his case would be made out. But there is a fatal gap of a whole year during Dobson's time. Neither he nor his tenant, Hart, exercised any acts of ownership on the land. The very stringent rule in *Trustees Executors and Agency Co. v. Short*, 13 App. Cas. 793, must, therefore, be applied—and it must be held that the defence of the statute has not been made out.

Some argument was addressed to us that the plaintiff had not made out his case. But he proved possession by his predecessor in title: that was *primâ facie* evidence of a fee simple: *Allen v. Rivington* (1671), 2 Saund. 111; *Doe dem. Smith and Payne v. Webber* (1834), 1 A. & E. 119; *Doe dem. Carr v. Bill-yard* (1828), 3 M. & Ry. 111; *Doe dem. Carter v. Barnard* (1849), 13 Q.B. 945; *Wallbridge v. Gilmour* (1871), 22 C.P. 135, at p. 137; Williams and Yates on Ejectment, 2nd ed., p. 250.

The appeal must be dismissed, and with costs.

KELLY, J.:—This is an action for possession, in which the defendant (the appellant) claims, as against the plaintiff, to be entitled to possession of the property in question, basing this claim upon possession by several successive trespassers or intruders. The evidence shews that the possession of these persons was not continuous—that there was a considerable interval between the time when possession was given up by one of them

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and the time when the next in succession took possession. During such an interval the law refers the possession to the real owner having title, and the person going into possession at the termination of such interval cannot claim the benefit of the possession of a trespasser prior to him, the statute beginning to run in his favour only on his entry: *Trustees Executors and Agency Co. v. Short*, 13 App. Cas. 793.

That being the state of the law, as I understand it, the appellant has not shewn possession for such a time as would entitle him to hold as against the respondent.

The appeal should be dismissed with costs.

LENNOX, J.:—The plaintiff has judgment for recovery of possession of the east half of lot 10, north of Ontario street, in the village of Bronté, from the defendant, with costs of action. In my opinion, the judgment of the learned Judge of the County Court, who tried the action, is correct, but for reasons other than those given by the learned Judge.

The plaintiff claims title as the administrator of the estate of his mother, Isabella Robinson, and also as one of the heirs-at-law, and assignee of all the other heirs-at-law, of his mother.

It is shewn by the evidence that Isabella Robinson purchased the property and obtained a conveyance from a person in possession, I. K. Croker, in 1871, and that she lived upon the property until 1875. The title of the plaintiff was questioned upon the argument, but I thought the argument was not seriously pressed. However this may be, possession in the registered owner is sufficient *primâ facie* evidence of title; and the learned Judge's finding upon this point cannot be disturbed.

The defendant claims title by length of possession under the statute. This he rests upon the occupation of successive trespassers, including himself, and upon having had transmitted to him for valuable consideration—although not by deed or writing—the title of his predecessors in trespass, for a period which, added to his own occupation, covers the whole statutory period of ten years.

The crux of the whole inquiry is, was the occupation continuous for ten years, and for at least ten years did each succeeding trespasser immediately follow the other without a



break? If they did, the defendant's title is made out. If they did not, he fails.

The learned Judge apparently did not understand it in this way; he says: "If there were ten consecutive years of such occupation adverse to the possession of the plaintiff, such occupation could only be made out by uniting the occupation of some two or more of the plaintiff's predecessors, or by (as by?) uniting Dobson's occupation with the defendant's; and the defendant failed to prove a conveyance or transfer of any kind of such occupation or possession from Pollock to Thomas, Thomas to Triller, Triller to Dobson, and Dobson to himself."

I am unable to agree with this conclusion of the learned Judge, that for the defendant to avail himself of the possession of his predecessor Dobson he must shew an actual conveyance of Dobson's claim, or a writing of any kind. See *Asher v. Whitlock* (1865), L.R. 1 Q.B. 1; *Simmons v Shipman*, 15 O.R. 101; *McConaghy v. Denmark*, 4 S.C.R. 609, at pp. 632-3; *Kipp v. Synod of Toronto*, 33 U.C.R. 220.

But this does not, by any means, dispose of the action. The presumptions are all in favour of the rightful owner, that is, of the person who claims regularly by, or under, a paper title, with possession under it. The onus is upon the defendant. He must clearly establish, not only that the true owner has been "out" for ten years, but that during that period of time some one else has been "in," and that this person has had possession by an actual, constant, and visible occupation. See the *McConaghy* case and cases noted at p. 633 of 4 S.C.R. And, furthermore, when, as in this case, he depends in part upon the occupation of predecessors in trespass, he must also clearly establish that these trespass occupants have followed each other in close succession—in an unbroken chain—the one coming in as soon as the other went out—during the time the statute was running. The moment the property becomes vacant the law attributes possession to the true owner.

Upon this question, Lord Macnaghten, delivering the judgment of the Privy Council in *Trustees Executors and Agency Co. v. Short*, 13 App. Cas. 793, at p. 798, says: "Their Lordships . . . are of opinion that if a person enters upon the

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land of another and holds possession for a time, and then, without having acquired title under the statute, abandons possession, the rightful owner, on the abandonment, is in the same position in all respects as he was before the intrusion took place. There is no one against whom he can bring an action. He cannot make an entry upon himself. There is no positive enactment, nor is there any principle of law, which requires him to do any act, to issue any notice, or to perform any ceremony in order to rehabilitate himself. No new departure is necessary. The possession of the intruder, ineffectual for the purpose of transferring title, ceases upon its abandonment to be effectual for any purpose. It does not leave behind it any cloud upon the title of the rightful owner, or any secret process at work for the possible benefit in time to come of some casual interloper or lucky vagrant."

In the same line are *McDonnell v. McKinty*, 10 Ir. L.R. 514, and *Smith v. Lloyd*, 9 Ex. 562.

Now as to the facts. The learned trial Judge specifically finds "that the defendant has failed to prove actual, continuous, open, visible, and exclusive occupation of the said land, either by himself or those under whom he claims, in succession, for a period of ten consecutive years."

"This is sufficient to dispose of the appeal: but I may add that a perusal of the evidence satisfies me that this finding is clearly supported by the evidence. There is some contradiction as to the boundary fence between this lot and number 9; and upon this point—not very material, perhaps—I think the probabilities and the preponderance of evidence are very much against the defendant's contention. But, at all events, it is beyond question that from the time that Hart became the tenant of Dobson of the adjoining lot 9 until the defendant took possession of it, as he says in 1903—a period of more than a year—the property in question was not occupied by any one. It was not in Hart's lease; Hart had nothing to do with it. Nor did Dobson work it or go upon it or do anything about it. They both swear to this.

*Appeal dismissed with costs.*

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*Mechanics' Liens—Registration of Claim—Proceedings by another Lienor—Mechanics' Lien Act, 10 Edw. VII. ch. 69, sec. 24—"In the Meantime"—Preservation of Lien—Time.*

Liens are, for the purposes of the Mechanics and Wage-Earners' Lien Act, 10 Edw. VII. ch. 69, divided into two classes: (1) liens for which a claim is not registered; and (2) liens for which a claim is registered. The lien is given by sec. 6, and exists independently of the registration of a claim. Before registration, there are two courses open to a lienor: (a) he may omit to register a claim, in which case his lien will either lapse or be enforced by action at his own instance or that of others; or (b) he may register a claim, in which case his lien will lapse on the expiration of ninety days, or he must bring an action within a certain time or some one else must. And thus the lienor who registers a claim must be taken to have abandoned all relief but what he can obtain under sec. 24.

By sec. 24, it is provided that "every lien for which a claim has been registered shall absolutely cease to exist on the expiration of ninety days . . . unless in the meantime an action is commenced to realise the claim or in which the claim may be realised under the provisions of this Act . . . :"—

*Held*, that the words "in the meantime" do not mean "between the time of registering the claim and the expiry of the time limited;" but any proceeding taken during the existence of the lien (at all events) is taken "in the meantime," within the meaning of sec. 24, if taken before the expiration of the periods mentioned in that section.

History of the legislation and review of the authorities.

Order of the Local Master at Ottawa affirmed.

APPEAL by the plaintiffs from an order of the Local Master at Ottawa, in a proceeding for the enforcement of a mechanics' lien.

The following statement of the facts is taken from the judgment of RIDDELL, J.:—

In August, 1909, the Rideau Club of Ottawa employed H. C. Hitch & Co. to erect a building and make some additions to a building already erected on the land of the club, for \$98,000. Hitch & Co., in 1910, employed the plaintiffs to furnish part of the materials for \$15,250, and have paid all but \$4,125 of that amount.

On the 30th June, 1911, the plaintiffs registered a claim for a lien under the Mechanics and Wage-Earners' Lien Act, 10 Edw. VII. ch. 69, sec. 17; and on the 31st July, 1911, framed, and on or about the 2nd August, 1911, filed and served a statement of claim under sec. 31 (2), (3), of that Act.

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The matter came on for trial before the Master at Ottawa, under sec. 33, in October, 1911; and he gave judgment in August, 1912; but the judgment has not yet been signed.

King, a master painter carrying on business at Ottawa, had, in July, 1910, entered into a contract with Hitch & Co. for the painting and glazing of the work for \$3,800. Computing extras, payments on account, etc., there was due at the completion of the work, in November, 1911, according to King's affidavit, the sum of \$1,830. King did not come in in the proceedings before the Master; but on the 15th December, 1911, he registered his claim for a lien.

After some fruitless negotiations for a settlement, King applied, under sec. 37 (6) of the Act, to be let in to prove his claim. The Master made an order on the 14th September, 1912, allowing him in; he to pay the costs of the application.

The plaintiffs now appeal, under sec. 40 (3); but, for the greater caution, have obtained leave in case Con. Rule 777 should be considered to apply.

October 17 and 18. The appeal was heard by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., RIDDELL and SUTHERLAND, JJ.

*J. E. Caldwell*, for the plaintiffs. The question for decision arises under sec. 24 of the Mechanics and Wage-Earners' Lien Act of 1910, under which it is contended by the appellants that the respondent's lien has "ceased to exist." It is submitted that the words "in the meantime" in sub-sec. 1 of sec. 24, as interpreted by the Standard Dictionaries bear out this contention. *McPherson v. Gedge* (1883), 4 O.R. 246, supports this view, and is the nearest in application to the case at bar.

*F. A. Magee*, for the respondent, King, argued that the respondent's claim was valid, not merely under sec. 24 of the Act, but also under sec. 23. The statute does not fix any *terminus â quo* from which "in the meantime" is to begin, and was correctly interpreted by the Local Master.

*Caldwell*, in reply, argued that the respondent had only one lien, which he had alternative modes of realising. Having chosen his remedy under sec. 24, the provisions of which are



absolute, and have no relation to the provisions of sec. 23, his lien became extinguished, as he had not complied with the conditions necessary to its continuance in force.

October 21. The judgment of the Court was delivered by RIDDELL, J. (after setting out the facts as above):—The main contention is based upon the provisions of sec. 24 of the Act, and it may be thus stated:—

Liens are, for the purposes of the Act, divided into two classes: (1) liens for which a claim is not registered; and (2) liens for which a claim is registered.

The lien is given by sec. 6, and exists independently of the registration of a claim; and, when the lien is in that condition, *i.e.*, before registration of a claim, there are two courses open to the lienor: (*a*) omit to register a claim, in which case his lien will either (1) lapse or (2) be enforced by action at his own instance or that of others; or (*b*) make up his mind to take the other course, and register his claim, in which case his lien will (1) lapse on the expiration of ninety days thereafter, or (2) he must take an action within a certain time or some one else must. In this view, the lienor who registers his claim must be taken to have abandoned all relief but what he can obtain under sec. 24.

I find no crevice in this logic—the words of sec. 24 are plain and unambiguous, that “every lien for which a claim has been registered shall absolutely cease to exist on the expiration of ninety days . . . unless . . .” something is done. It is not that the claim for a lien shall become ineffective, etc.; but that the lien itself, which exists independently of the claim, absolutely ceases to exist.

What is it then that will keep alive the lien after “the expiration of ninety days after the work or service has been completed or materials have been furnished or placed, or after the expiry of the period of credit . . .”?

It is “in the meantime an action is commenced to realise the claim or in which the claim may be realised under the provisions of this Act. . . .”

The words “in the meantime,” it is contended, must mean

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“between the time of registering the claim and the expiry of the time limited.” No doubt, the words would bear that interpretation—but with that interpretation what would be the result?

A lienor has, without registering, already commenced an action: for the sake of ordinary business caution he registers his claim—he must discontinue his action and begin *de novo*, otherwise the action is not “commenced” . . . in the meantime.”

Or, without registering, he is proceeding with the proof of his claim under proceedings instituted by another—he registers: he must stop; his proceedings in the pending action will be of no avail—he must bring another action or get some one else to do so.

This is manifest absurdity—still the Legislature may pass absurd legislation if so inclined. But, before we decide that that is the meaning of the language employed, we should see if there is no other interpretation possible which will not result in an absurdity.

“In the meantime,” no doubt, has the primary signification “during or within the time which intervenes between one specified period or event and another:” Murray’s New English Dictionary, *sub voce* “meantime,” vol. 6, p. 276. col. 2, A.1. The original of “mean” is the same as that of “mesne,” i.e., “*medianus*” late Latin for “in the middle,” from “*medius*.” In strictness there is in contemplation a *terminus â quo* as well as a *terminus ad quem*, a date or event with which the period begins as well as a date or event with which it ends. But in no few instances the *terminus â quo* is not in mind at all, it is the *terminus ad quem* which is the only date, etc., in contemplation (most frequently, perhaps, it is the present time, actual or supposed, which is the *terminus a quo*). In such a case, the words are equivalent to “before such and such an event, a date, a period.”

In the inquiry whether this be not the real meaning of the expression, I think the history of the legislation is all important. It is true that counsel for the respondent repudiated the idea that he could receive any assistance from the consideration of former statutes; but we are bound to use every means of doing

justice between the parties, irrespective of what their representatives may say.

The first Ontario Act was (1873) 36 Vict. ch. 27. That, by sec. 1, gave a lien in words not dissimilar to those in sec. 6 of the present Act (1910), 10 Edw. VII. ch. 69; but in sec. 2 it was provided: "No lien under this Act shall exist unless and until a statement of claim, in the form, or to the effect in Schedule A. . . . is filed in the registry office . . . ." Section 4 provides: "Such lien shall absolutely cease to exist within (*sic*) ninety days after such work shall have been completed, or materials or machinery furnished or the expiry of the period of credit, unless in the meantime proceedings shall have been instituted to realise such a claim. . . ."

Under this state of the law the lien did not exist until the filing of the claim—no proceedings by way of action, bill in Chancery or otherwise could be taken without that indispensable prerequisite; but the time of filing was wholly immaterial. When, then, it is said in sec. 4 that the lien shall cease unless "in the meantime proceedings" are instituted, there is no reference to, no contemplation of, the date of the filing. There is no intention to provide that proceedings shall not be had before the filing—no lien then existed. What is meant is simply that a lien which has come into existence "shall . . . cease to exist" unless proceedings are instituted before the expiration of certain days which have no relation to the filing at all.

That this is the real meaning is made, perhaps, more clear by the first amendment, the following year (1874), 38 Vict. ch. 20. In this Act a lien is given by sec. 2; and it is, as now, not the filing but the doing of work, supply of materials, etc., which gives the lien: *McCormick v. Bullivant* (1877), 25 Gr. 273.

There is often misunderstanding—as there was upon the argument before us—from not sufficiently distinguishing between the lien given by the statute and the claim for lien which may be filed. Under the previous legislation, every lienor had to take proceedings himself (or his assignee, *Grant v. Dunn* (1883), 3 O.R. 376): by this Act, sec. 13, any number of lienors may join in one suit.

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There is in this Act no provision for filing a claim, but the Act of 1873 is not repealed—the only provision being sec. 20, “All Acts inconsistent with the provisions of this Act are hereby repealed.”

It is obvious that the two Acts are not wholly inconsistent; they went on side by side, so far as they did not clash: *e.g.*, in *Walker v. Walton* (1876), 24 Gr. 209, it was held by the Court of Chancery that a claim for a lien registered before the coming into force of the Act of 1874, followed by a bill in Chancery within ninety days from the expiry of the period of credit, was insufficient to get over the express words of the Act of 1874, sec. 14: “Every lien shall absolutely cease to exist after the expiration of thirty days after the work shall have been completed . . . unless in the meantime proceedings have been instituted to realise the claim under . . . this Act . . .” But the Court of Appeal, *Walker v. Walton* (1877), 1 A.R. 579, reversed this, holding that the Interpretation Act, sec. 7 (34), preserved the right of the plaintiff. But neither Court suggested that both Acts were not in force, that of 1874 as a whole, and that of 1873 so far as it was not inconsistent with the later Act.

It is sec. 14 of the Act of 1874 which most requires consideration. As we have seen, it reads: “Every lien shall absolutely cease to exist after the expiration of thirty days after the work shall have been completed . . . unless in the meantime proceedings have been instituted to realise the claim under the provisions of this Act . . . .” The same terminology “in the meantime” is used here as in the Act of 1873—and it is apparent that no *terminus â quo* was in contemplation of the legislators. I think this helps us to infer that in the Act of 1873 the meaning was, as in this Act—“A lien having attached, it becomes absolutely void unless, before the expiry of a certain period, proceedings are taken to realise it.”

That the former Act continued may also be seen. In *Bunting v. Bell* (1876), 23 Gr. 584, after the Act of 1874, a claim was filed in the registry office on the 2nd July, and bill filed in Chancery on the 15th July: the lien was sustained.

Accordingly, when the revision was made in 1877, the two



Acts were consolidated (R.S.O. 1877, ch 120). The lien was, as in the Act of 1874, given by the doing of the work, etc., and not, as in the Act of 1873, by the filing of a claim. Provision was made by sec. 4 that "a statement of claim . . . may be filed in the registry office . . . ;" by sec. 15, any number of lienors may join in one suit.

Then comes sec. 20, which purports to be a consolidation of 38 Vict. ch. 20, sec. 14, and 36 Vict. ch. 27, sec. 4: "Every lien which has not been duly registered . . . shall absolutely cease to exist after the expiration of thirty days after the work has been completed . . . unless in the meantime proceedings are instituted . . ." This, it is plain, is a continuation of the practice under the Act of 1874.

Section 21 provides: "Every lien which has been duly registered . . . shall absolutely cease to exist after the expiration of ninety days after the work has been completed . . . unless in the meantime proceedings are instituted to realise the claim . . ." This is plainly, as indeed it purports to be, a transcript of the provisions of the 4th section of the Act of 1873. It is made to apply only to liens claims for which have been registered, because such liens only are provided for by the Act of 1873. The same words "in the meantime" are used as in that Act, and I do not think that they have any application to the date of filing at all. What is meant in this section by these words is what was meant in the Act of 1873, in the Act of 1874, and in sec. 20 of R.S.O. 1877, ch. 120—before the expiration of the period named. And no more than in the Act of 1873 was the time of filing taken into consideration, or was it intended to be provided that proceedings to be effective must be taken after the filing.

The same terminology is carried on through R.S.O. 1887, ch. 126, secs. 22, 23; (1896) 59 Vict. ch. 35, secs. 22, 23; R.S.O. 1897, ch. 153, secs. 23, 24; 10 Edw. VII. ch. 69, secs. 23, 24—and the same meaning must be attached to the words in the present Act as in its predecessors.

The result is, that any proceeding taken during the existence of the lien (at all events) is taken "in the meantime," within the meaning of sec. 24, if taken before the expiration of

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the periods mentioned in sec. 24. The proceedings taken by the plaintiffs were such proceedings in point of time. Section 32 provides that "an action brought by a lien-holder shall be taken to be brought on behalf of the other lien-holders." Therefore, these are proceedings "in which the claim may be realised under the provisions of this Act."

The order appealed from is right; and this appeal should be dismissed, and with costs.

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[DIVISIONAL COURT.]

CITY OF TORONTO v. FOSS.

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June 14.  
Oct. 21.

*Municipal Corporations—Prevention of Use of Buildings as "Stores" or "Manufactories"—Municipal Act, 1903, sec. 541a—By-law—Ladies' Tailoring Business.*

A building in a city street used by the owner or tenant thereof as a dwelling-house for himself and his family, and also, during part of the year, for the purposes of a ladies' tailoring business, carried on by him in the manner described below, cannot be said to be used as a "store" or "manufactory," within the meaning of a city by-law passed pursuant to sec. 541a of the Municipal Act, 1903, as enacted by 4 Edw. VII. ch. 22, sec. 19, empowering the councils of cities to pass by-laws "to prevent, regulate and control the location, erection and use of buildings for laundries, butcher's shops, stores and manufactories;" RIDDELL, J., dissenting.

Judgment of MIDDLETON, J., reversed.

MOTION by the plaintiffs for an injunction restraining the use by the defendant of certain premises upon Avenue road, Toronto, as a ladies' tailoring establishment.

June 12. The motion was heard by MIDDLETON, J., in the Weekly Court at Toronto, and, by consent of counsel, was turned into a motion for judgment.

*C. M. Colquhoun*, for the plaintiffs.

*W. C. Chisholm*, K.C., for the defendant.

June 14. MIDDLETON, J.:—Section 541a of the Municipal Act, 1903, as enacted by 4 Edw. VII. ch. 22, sec. 19, empowers the councils of cities to pass by-laws "to prevent, regulate and control the location, erection and use of buildings for laundries, butcher's shops, stores and manufactories,"

A by-law was passed on the 4th January, 1905, prohibiting the location of stores and manufactories upon Avenue road.

The sole question is, whether the defendant is using the house in question as a store or manufactory, within the meaning of this by-law.

In January last, the defendant rented the premises in question, which theretofore had been constructed for and used as a residence. He therein carries on a ladies' tailoring business, in the course of which he purchases suit-lengths of cloth, sells them if approved by customers, and makes them into suits. If the goods produced do not meet the taste of the customers, he purchases goods from retail stores and makes these up. He also makes up goods brought in to him by his customers.

The building has not been structurally altered, and is used by the defendant as his residence, as well as for the purposes of his business. Those employed by him to assist him in his business use a room in the building as a sewing-room.

I do not think that this use of the building constitutes it a manufactory, within the meaning of the statute. It is true that the word "manufactory" or "factory" has a dictionary meaning wide enough to cover the case; but I think that the word, as used by the Legislature, contemplates operations on a larger scale than this, and that the use of a room in a dwelling-house by three or four persons as a sewing-room falls short of what is required.

I am, however, of opinion that what is done does constitute the premises a "store" within the meaning of the statute.

Counsel agreed upon the argument that the word "store" was here used as equivalent to the word "shop." It is a place where goods and merchandise are bought and sold; and, when the object of the statute is borne in mind, I think this is the thing which is intended to be prohibited. Slightly modified meanings are given to the word in different contexts. The cases may be found collected in Words and Phrases Judicially Defined, vol. 7, p. 6672. I do not see that any good purpose would be served by reviewing and attempting to classify cases here.

It is said that the plaintiffs have not enforced the by-law in similar cases. I do not think that this really affects the matter;

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but the circumstances, I think, justify my directing that the injunction shall not become operative for a period of six months, so as to enable the defendant to make other arrangements.

Judgment will, therefore, be for the injunction sought, with the stay indicated. I do not think it is a case in which costs should be awarded.

The defendant appealed from the judgment of MIDDLETON, J.

September 17. The appeal was heard by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.

W. C. *Chisholm*, K.C., for the defendant. The question for decision is as to the construction of a by-law of the City of Toronto, which enacts that no building shall hereafter be erected or used as a store or manufactory within an area including the property in question. The learned Judge held that the use made of the property by the defendant does not constitute it a "manufactory," but that it is a "store" within the meaning of the by-law. It is submitted that the latter conclusion is not justified by the evidence. The defendant occupies the premises as a residence, but carries on, during a few months of the year, what may be called a ladies' tailoring business, in a manner similar to that in which an artist or photographer pursues his vocation. The word "store" is here equivalent to what is called in English usage a "shop," and does not come within what is defined in American cases as a "store:" *The State of Canney* (1848), 19 N.H. 135; *Words and Phrases Judicially Defined*, vol. 7, p. 6672 *et seq.* If this defendant is restrained from carrying on business in this way, every dressmaker in Toronto will be under the same liability. The plaintiffs have not enforced the by-law in similar cases heretofore.

C. M. *Colquhoun*, for the plaintiffs, stated that his clients were not aware of prior breaches of the by-law, if any such existed; and, as to the position of a photographer's shop, referred to *Wilkinson v. Rogers* (1864), 2 De G. J. & S. 62. The defendant exhibits the cloth which he sells, has it ticketed, and makes a profit on it. The defendant carries on both a store and a manufactory within the meaning of the by-law; and, as to the former contention, the plaintiffs rely upon the reasoning and judgment of the learned Judge below.



*Chisholm*, in reply.

October 21. FALCONBRIDGE, C.J.:—It was agreed by counsel that the word “stores” in by-law 4469 was used in its American sense, as equivalent to “shops.”

My brother Britton in his judgment sets out the facts more fully than they are stated in the judgment appealed from. The question is, whether the defendant is using the house on Avenue road as a “store or manufactory” within the meaning of the by-law.

I agree with the learned Judge appealed from that the use of the room in a dwelling-house as a sewing-room for three or four persons does not constitute the premises a manufactory.

Nor do such use and the business practice of the defendant, in my opinion, make the place a “store,” *i.e.*, a shop for the sale of goods by wholesale or retail. No goods are sold by the defendant until after he has made them up for customers, and he also makes up goods brought in by customers. Gilchrist, C.J., in *The State v. Canney*, 19 N.H. 135, at p. 137, says: “Thus we do not call the place where any mechanic art is carried on a *store*, but we give it the name of *shop*, as a tailor’s shop, a blacksmith’s shop, a shoemaker’s shop.” If we accept this definition of an American word by an American Judge, it will be observed that the only “shop” prohibited by the by-law is a butcher’s shop.

I do not think that the intermittent use of this house, as described, constitutes it a *store*.

In my opinion, the appeal should be allowed with costs and the action dismissed with costs.

BRITTON, J.:—The action is for an injunction to restrain the defendant from using the building and premises No. 78 Avenue road as a store or manufactory, in breach of by-law No. 4469 of the Corporation of the City of Toronto.

The motion for an injunction was, by consent, turned into a motion for judgment, and the learned Judge held, upon the evidence, that the use of the building did not constitute it a

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manufactory, within the meaning of the statute, but that the use of the building did constitute it a "store."

The defendant appeals.

The by-law was passed on the 4th January, 1905, and it enacts that "no building shall hereafter be located, erected, or used for laundries, butcher shops, stores, or manufactories upon property. . . . Nor shall any person locate, erect, or use for laundries, butcher shops, stores, or manufactories any such building . . ."

There is no question about the prohibited area. The sole question is, Is the use the defendant makes of this building such as to constitute the building a store, within the meaning of the by-law or of the statute authorising the by-law? .

With great respect, I am unable to agree with the learned trial Judge. I think he was absolutely right, and for the reasons stated, in his conclusion that the use of the building did not constitute it a manufactory. He says: "I do not think that this use of the building constitutes it a manufactory, within the meaning of the statute. It is true that the word "manufactory" or "factory" has a dictionary meaning wide enough to cover the case; but I think that the word, as used by the Legislature, contemplates operations on a larger scale than this, and that the use of a room in a dwelling-house by three or four persons as a sewing-room falls short of what is required.

I am, however, of opinion that what is done does constitute the premises a 'store.' "

To apply the reasoning of the learned Judge in reference to factory, to the word "store," it seems to me that the word "store," as used by the Legislature, contemplates operations on a larger scale than merely purchasing a comparatively small quantity of material for ladies' dresses in skirt lengths and making these up by measure and to order, charging for the finished article.

The defendant is what is called a ladies' tailor. He keeps no general assortment of goods or commodities. His premises are not fitted up with counters or shelving. When he purchases material to be made into dresses, he places this upon the piano or a chair or chairs. He now has no sign. He did have a sign,

but, finding out, by proceedings against him in the Police Court, that the sign was objectionable, he removed it before the commencement of this action. The sign, as it was, was not that of a "store."

The place is not a factory. It has been held, and quite rightly, that he may have three or four persons in a sewing-room doing work.

This defendant has only two at most—a man and woman—helpers to make up work.

The facts must be as stated by the defendant himself. The plaintiffs rely upon these. He says that it is a small business—he does not advertise—but, all the same, does a fairly large business for those who wear "a lot of clothes," as he says, and of excellent quality, no doubt; but his principal business in making these clothes is only for three months in spring and three months in autumn, and he gets only about a living for himself and family. This house is his family residence. Fifty per cent. of all his work is when ladies bring in their own material. Ladies bring goods bought in Europe to the defendant to be made up. Of the other fifty per cent. of work, a part is where ladies choose a dress at a store in the city, and the defendant is authorised to purchase the cloth and make it up. The defendant gets a discount on such a purchase, and that he claims as part of his profit. He buys it for the customer; he makes it up for the customer, charging for the work, and charging for the material what the customer would be obliged to pay for it at the store in the city. He shews what he has in suit lengths, and if a customer is not satisfied to have a dress made up, upon a description from the customer he endeavours to find in some store what will be satisfactory. He does this for the sake of the profit to him in the manufacture, and in the discount, if he gets a discount. He does not sell any cloth from the roll, or cut into lengths. No doubt, there is in a sense a sale of the cloth, when he sells the made up article, but there is the broad distinction that this man makes his living by his skill and taste and labour in making dresses for society ladies, who require first-class work.

I do not think the residence of this defendant any more a

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store than it is a factory—it is no more a store than is the house of a lady who makes marmalade and puts it in jars for those who order and pay for it. There are ladies who make and sell cake to their friends; others who make underwear and sell it to well-to-do friends; others who make and sell to professional gentlemen bands and ties. Industrious persons who require money to aid in support of the family have a sewing-room or other room where their labour is put upon raw material, and profit derived therefrom.

It is a wrong use of words to say that such houses are either factories or stores. A store is well-understood by every person to be a place “where merchandise is kept for sale,” as a grocery store, a dry goods store, a hardware store, etc.

The defendant’s place may be called a dress-making establishment—it is that, in a small and select way—but it is not a store, as the word is generally used, and not so within the meaning of the statute or by-law. The word “shop” may sometimes mean a “store,” and is used in that way, whether with or without a prefix; but the word “store” can never be properly used in reference to places that are in reality and are called shops. That is recognized in the Act, when butcher shops are specified. Any enlarged meaning of the word “shop” cannot be invoked in this case, to make the defendant’s place a store, when not a store according to the well-understood meaning of the word “store” as ordinarily used.

I think the appeal should be allowed with costs, and the action dismissed with costs.

RIDDELL, J.:—I am of opinion that my learned brother Middleton is right, and I have nothing to add to his judgment.

The appeal should, in my judgment, be dismissed with costs.

*Appeal allowed; RIDDELL, J., dissenting.*



[BRITTON, J.]

MORRISON V. PERE MARQUETTE R.R. Co.

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Oct. 29.

*Railway—Breach of Statutory Duty—Neglect to Furnish Accommodation for Passengers at Station—Dominion Railway Act—Exposure of Passenger to Cold—Damages—Remoteness—Findings of Jury.*

*Held*, that the plaintiff had a right of action against the defendant railway company for breach of their statutory duty to provide suitable accommodation for passengers at a place where trains stopped to take up and set down passengers: Dominion Railway Act, R.S.C. 1906, ch. 37, secs. 2(31), 151(g), 167(1), (2), 258(2), 284(1), (7).

*Held*, also, that the fact of the Board of Railway Commissioners for Canada having power to compel a railway company to provide a station at any place on the road where required, as proper accommodation for the traffic on the road, did not affect the question of the defendants' liability.

In an action for damages for injury to the plaintiff from exposure to cold while waiting for a train at a stopping-place where no station-house or shelter was provided, the jury found that an illness from which the plaintiff suffered was occasioned by reason of the absence of a station-house at the place referred to, and assessed the plaintiff's damages at \$1,500:—

*Held*, that the damages were not too remote.

*Hobbs v. London and South Western R.W. Co.* (1875), L.R. 10 Q.B. 111, distinguished.

*McMahon v. Field* (1881), 7 Q.B.D. 591, *Grinsted v. Toronto R.W. Co.* (1894), 21 A.R. 578, and *Toronto R.W. Co. v. Grinsted* (1895), 24 S.C.R. 570, followed.

ACTION for damages occasioned to the plaintiff by exposure to cold when waiting for a passenger train of the defendants at a stopping-place where there was no station-house.

September 30. The action was tried before BRITTON, J., with a jury, at Sandwich.

*J. H. Rodd* and *W. G. Bartlett*, for the plaintiff.

*E. A. Cleary*, for the defendants.

October 29. BRITTON, J.:—The plaintiff, a resident of Windsor, in the county of Essex, on the 20th day of July, 1911, was absent from home, and was near to the station of Marshfield, a stopping-place for passenger trains on the defendants' line of railway. Trains ran from points east of Marshfield to Marshfield, and on west to the town of Walkerville. The plaintiff, on his own proper business, desired to take and did in fact take, at Marshfield station, the train due to leave Marshfield at or about 8.45 o'clock. The plaintiff went to the station, arriving there only a

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short time before the time at which the train was due to arrive. The train was in fact late in arriving—the plaintiff says, two hours late. The weight of evidence is, that it was about forty-nine minutes late. There was not on that evening any suitable or adequate accommodation for passengers—no station-house, no place provided for shelter for persons who intended to go upon or alight from the train. The plaintiff alleges that the evening was quite cold and chilly; that, by reason of his forced exposure, he caught cold, and became seriously ill, and was sick for a long time, incurring expenses for medical attendance, and was unable to attend to his business.

It was in evidence that there had been a station building at Marshfield for years. This building was destroyed by fire over two years before the 20th July, 1911. Notwithstanding the destruction of the building, the defendants continued the place as a regular stopping-place—selling tickets and collecting fares from passengers to and from Marshfield.

I submitted this question to the jury: “Was the sickness of the plaintiff which commenced on the 20th July, 1911, occasioned by reason of the absence of a station-house at Marshfield station on the line of the defendants’ railway?” To this question the jury answered, “Yes.” I asked the jury to assess the damages, if they thought the plaintiff had really sustained any from that cause, and they assessed these at \$1,500.

Apart from what is involved in these questions, there is no question of fact in controversy in the case. I dealt with the questions submitted in my charge to the jury.

The liability, if any, depends upon the following sections of the Dominion Railway Act, R.S.C. 1906, ch. 37:—

Section 258, sub-sec. 2. In this case there had been location of the station.

There is no doubt about the powers of the railway company to provide the necessary accommodation. See sec. 151, sub-sec. (g); sec. 167, sub-secs. 1 and 2.

Section 284, sub-sec. 1: “The company shall, according to its powers,—(a) furnish . . . at all stopping-places established for such purpose, adequate and suitable accommodation for the receiving and loading of all traffic offered for carriage upon the railway.”

“Traffic” means the traffic of passengers, goods and rolling stock: sec. 2, sub-sec. 31.

Section 284, sub-sec. 7, renders the company liable to an action at the instance of any person aggrieved by the neglect of the company to comply with the requirements of this section.

I am of opinion that the fact of the Board of Railway Commissioners for Canada having power to compel a railway company to provide a station at any place on the road where required, as proper accommodation for the traffic on the road, does not affect the question of the defendants’ liability in such a case as the present.

It was objected by the defendants that the plaintiff was not entitled to recover, as the damages were too remote.

If the plaintiff’s right of action depends only upon a breach of contract—express or implied—safely to shelter and carry passengers ready to be carried and to pay their passage-money at and from Marshfield, the objection may be well taken. The injury to the plaintiff for which he seeks compensation is not such an injury as can fairly be considered to have been within the contemplation of the parties as the natural result of the breach by the defendants of their duty under a contract merely safely to receive and carry passengers. The plaintiff’s right of action is because of a breach of a statutory duty cast upon the defendants. If the plaintiff has suffered from the breach of duty—and the jury has found for the plaintiff—then the plaintiff is entitled to the actual damages sustained by him, and that amount the jury finds to be \$1,500. The plaintiff says that he caught the cold from which he became ill, on the evening of the 20th July, 1911—the midsummer season of the year. The day had been hot—the evening was very cool for the season, and yet it would not in an ordinary case be expected that a person waiting in the open for an hour, for the arrival of an overdue train, would take cold; a cold may be taken at any time and in an infinite variety of ways. The plaintiff says he did take cold that evening by reason of exposure—sickness followed. Medical evidence was that the plaintiff might have caught cold as he says—the jury have found in his favour.

The case is, I think, distinguished from *Hobbs v. London and*

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*South Western R.W. Co.* (1875), L.R. 10 Q.B. 111. That was an action for breach of contract, and the damages, as was held, did not naturally result from the breach.

*McMahon v. Field* (1881), 7 Q.B.D. 591, was an action for breach of contract to find suitable stabling for horses. The horses took cold from exposure, and it was held that, in such a contract, damages from that cause were not too remote.

*Grinsted v. Toronto R.W. Co.* (1894), 21 A.R. 578, affirmed in *Toronto R.W. Co. v. Grinsted* (1895), 24 S.C.R. 570, is in the plaintiff's favour

Judgment will be for the plaintiff for \$1,500 with costs.

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[DIVISIONAL COURT.]

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Nov. 2.

POWELL-REES LIMITED V. ANGLO-CANADIAN MORTGAGE  
CORPORATION.

*Judgment Debtor—Company—Examination of Director as Officer—Con. Rules 902, 910—Practice—Interlocutory Order—Appeal—Necessity for Leave.*

*Held*, affirming the decision of RIDDELL, J., 26 O.L.R. 490, that a director is an officer of a company who may be examined under the provisions of Con. Rule 902.

Under that Rule, an examination can be had without an order.

And *held*, that, if there was any doubt about the correctness of the decision, the case was one in which an order for examination might well be made under Con. Rule 910.

*Semle*, that the order of RIDDELL, J., was not in its nature final, but merely interlocutory, and no appeal lay without leave.

AN appeal by E. R. Reynolds from the order and decision of RIDDELL, J., 26 O.L.R. 490.

September 23. The appeal was heard by a Divisional Court composed of BOYD, C., LATCHFORD and MIDDLETON, JJ.

*E. R. Reynolds*, the appellant in person. The defendant corporation never received an initial certificate of registry, as required by the corporation by-laws and required by R.S.O. 1897, ch. 205, the statute under which the defendant corporation was incorporated, and never held a first statutory meeting, and has not now and never had any officers, and never commenced business; and it has not now, and I am not now and never was, an officer or servant of the corporation, within the meaning of Con. Rule 902: *Ahrens v. Tanners' Association* (1903), 6 O.L.R. 63.



The defendant corporation has no power to appoint any officers until it is properly registered, and it has no right or authority to hold a statutory meeting for that or any other purpose until it is properly registered.

*M. C. Cameron*, for the plaintiffs. The order appealed from is right, for the reasons given by the learned Judge. Reynolds is estopped from denying that he is president of the company, as he is stated to be so in the prospectus. A provisional director is an officer who may be examined under the provisions of Con. Rule 902. I can find no direct authority on this point, but see *Société Générale du Commerce et de l'Industrie en France v. Johann Maria Farina Co.*, [1904] 1 K.B. 794. At any rate, an order for examination may be made under Con. Rule 910.

*Reynolds*, in reply. If I should hold myself out as president, I should be liable to a fine, yet I may properly set myself out as such in the prospectus.

November 2. The judgment of the Court was delivered by MIDDLETON, J.:—An appeal by E. R. Reynolds from the order of Riddell, J., allowing the examination of the appellant for discovery, as an officer of the defendant company, after judgment.

The appeal is irregularly brought, as leave to appeal had not been obtained, and the order is not in its nature final, but is merely interlocutory.

Counsel agreed to waive this objection if the argument before us was confined to the question of the right of the judgment creditors to examine the appellant.

We agree with the judgment in review that a director is an officer who may be examined under the provisions of Con. Rule 902. If there could be any possible doubt as to the correctness of this, the case is one in which an order might well be made for examination under Con. Rule 910. The practice in this case seems to have been lax, as an examination under Con. Rule 902 can be had without an order.

*Appeal dismissed.*

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[DIVISIONAL COURT.]

Nov. 6.

SMITH v. BARFF.

*Principal and Agent—Agent's Commission on Sale of Land—Contract—  
"Selling my Property"—Procuring Purchaser Acceptable to Principal—  
Agreement for Sale not Carried out.*

The plaintiff, who acted as a real estate agent, asked the defendant's wife if she wished to sell land standing in the defendant's name. She said, "If you bring me a purchaser, I will sell it." The plaintiff found a purchaser, one H.; and an agreement of sale was signed by the defendant and H. After that, the defendant signed a writing by which he agreed to pay the plaintiff the usual commission "for selling my property." H. refused to carry out the sale; and the plaintiff sued for the commission:—

*Held* (BRITTON, J., dissenting), that what both parties meant by selling the property was the successful effort of the plaintiff to procure a purchaser acceptable to the defendant, this purchaser signing a contract acceptable to the defendant; and, therefore, the plaintiff was entitled to a commission.

"Sale" may properly be used as meaning an agreement for sale, even if it be not implemented by conveyance.

*Peacock v. Freeman* (1888), 4 Times L.R. 541, and *Robinson v. Reynolds* (1912), 3 O.W.N. 1262, distinguished.

*Mackenzie v. Champion* (1885), 12 S.C.R. 649, specially referred to.

Judgment of DENTON, Jun.Co.C.J., reversed.

AN appeal by the plaintiff from the judgment of DENTON, Junior Judge of the County Court of the County of York, dismissing an action in that Court, brought to recover a commission for the plaintiff's services as agent in procuring a purchaser for the defendant's land. The dismissal of the action was upon the ground that the defendant agreed to pay a commission to the plaintiff only for *selling the property*, and, as the property was not sold, the defendant was not liable to pay the commission.

September 20. The appeal was heard by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.

*L. C. Smith*, for the plaintiff, argued that, as the agreement to pay commission was reduced to writing after the written offer to purchase the property had been accepted in writing by the vendor, it was evident that the intention of the parties was that the defendant should pay the commission in consideration of what the plaintiff had already done. In *Peacock v. Freeman* (1888), 4 Times L.R. 541, cited by the learned trial Judge, the circumstances were different, and the case does not apply here. In *Robinson v. Reynolds* (1912), 3 O.W.N. 1262, also cited by

the trial Judge, the agreement to purchase was defective, and the other circumstances of the case distinguish it from the case at bar. He also referred to *Hunt v. Moore* (1911), 2 O.W.N. 1017; *Prickett v. Badger* (1856), 1 C.B.N.S. 296; *Fisher v. Drewett* (1878), 48 L.J.Q.B. 32; *Platt v. Depree* (1893), 9 Times L.R. 194.

*D. Inglis Grant*, for the defendant, argued that, under the terms of the agreement, the commission was not payable unless the property was actually sold, and relied on the cases first cited above and other cases referred to in the judgment of RIDDELL, J.

November 6. RIDDELL, J.:—The plaintiff is a foreigner, who seems to act as a real estate agent; the defendant was the owner of certain lots, three in number, in Toronto; at least they are in his name. He seems to have been desirous of selling the lots; and, about the middle of March, 1911, the plaintiff and one Herman came to his house and asked Mrs. Barff if she wanted to sell. Barff seems to have been away from home during the day-time, and Mrs. Barff to have transacted business in connection with the lots. She said: "We wanted to sell: of course, if we got our price we would sell." It is apparently clear that at that time she said, "If you bring me a purchaser, I will sell it." So Smith swears, and she does not contradict him—and she mentioned the price she wanted.

About two months thereafter, the two men came to her house with one Heller, and he made an offer of \$2,500 for each of the lots; she wanted \$2,800. "I said I would not accept it; that I knew Mr. Barff would not accept; we wanted \$2,800 or none at all." Then Heller offered \$2,600 for each lot, and she said, "I know Mr. Barff will not accept that;" and then Heller asked for pen and paper, and, getting them, wrote out an agreement of purchase and also a cheque for \$200 as a deposit. Leaving the cheque according to one story, taking it with them according to another, the three went away: in the evening the two agents returned and saw Mr. Barff; and, "after a lot of talk" (to use his own words), "we decided that I would accept the agreement as made out and the \$200 cheque as a deposit. . . . Then I signed the agreement." Then the plaintiff produced an agree-

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ment which had been written or perhaps was then written out by Herman, and Barff signed that. It reads: "I, Mr. Thomas Barff, agree with L. Smith to pay The yussel comition 2½% for seling my property 6-8-10 Stanley Ave. in the City of Toronto. April 3rd, 1911. Thomas Barff."

The cheque was either handed over to or simply left with the defendant as the deposit. As I have said, there is a conflict as to whether it had been taken away after the day interview.

There is a difference of recollection as to what was said about the cheque; but, like the other conflict, it is, in my view, quite immaterial.

The plaintiff's story is: "I said, 'Mr. Barff, would you like to pay me my commission right away?' I said, 'My commission is \$195, and you sign that cheque, and I will give you cheque for \$5;' and I went down to the bank, and bank refused to pay."

The defendant's account is: "I had the cheque in my hand, and Mr. Smith said, 'You can give me that and I will get it cashed for you.' He said, 'You can give me that and I will get it cashed for you.' Q. Is 'cashed' the last word he said? A. Yes, and with that they took it away."

The defendant's counsel before us contended that this was an agreement on the plaintiff's part to accept the cheque endorsed by the defendant as payment of his commission. If the plaintiff agrees, we should let him accept the cheque as in payment of commission, amend his pleadings now, claiming upon the cheque, and be awarded the amount, with County Court costs of action and appeal—that is, if the defendant does not object.

Notwithstanding the argument of the defendant's counsel, I do not see that there was such an accord and satisfaction as is contended for. The whole transaction is, I think, clearly nothing more than the plaintiff, being anxious to get his commission, saying to the defendant: "Give me the cheque; I shall get it cashed, pay myself out of the proceeds, and pay you the balance." It is at least clear that any offer on his part to accept the cheque as payment of his commission and to give his cheque for \$5 was not accepted.

Heller seems to have changed his mind almost at once, thought he had paid too much for the property. The day after



the cheque was handed to Smith, he (S.) went to the bank—the bank said, “Call around later on, and the cheque will be all right;” but, later on, payment was refused, as they had been instructed not to pay it.

Smith brought back the cheque, and appears to have given it to Mrs. Barff.

At the time of the contract for sale, the defendant had given the purchaser the name of his solicitor, but Mrs. Barff wanted to make a change, and went down town early to prevent the purchaser from going to the solicitor named. She saw Herman and then Smith, had the board taken off the houses, as “they were sold,” and was introduced by these two to Mr. H. as a solicitor whom they had found very good. She delivered the deed to Mr. H. to have the sale carried out—Mr. H. to act for the vendor. She was then (apparently) told that the cheque was stopped. Mr. H.’s advice was asked, and he advised suit in the name of the defendant. An action was brought and judgment obtained, which was set aside on some ground not disclosed. She told her husband that the suit was to be brought in his name, and no objection was made, so far as appears—none is suggested.

A respectable firm of solicitors acted for the purchaser, requisitions of title passed between the solicitors; the trial on the cheque was adjourned from time to time, and the Judge at length said that he would not try the question pending the disposition of the requisitions of title; and Mrs. Barff then “refused to go any further, there being so much trouble and annoyance about it that they would not be bothered any more with it;” “it reached a stage that an action had to be brought in some form or another to compel Heller to carry it out—and the conclusion was . . . that they made up their minds not to have anything more to do with it.”

It seems quite clear that Heller is a man of substance, and that there was no ground for failing to carry out his purchase, but that he thought he was paying too much.

This action was brought in the County Court of the County of York. His Honour Judge Denton dismissed the action, on the ground that, “as the defendant only agreed to pay a com-

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mission to the plaintiff for *selling the property*, and as the property was not sold, he is not liable to pay the commission."

The plaintiff now appeals.

In this case we must determine what the parties meant by "selling the property;" and that, under the facts, I cannot think at all doubtful. Mrs. Barff had told the plaintiff, "If you bring me a purchaser, I will sell it." The purchaser was brought, and Barff (if not Mrs. Barff) did sell the property in the usual sense of the word—so much so that the boards were taken off the houses because they were "sold." There was nothing more for the agent to do; and I am of opinion that what both parties meant by "selling the property" was the successful effort of Smith to procure a purchaser acceptable to the vendor, this purchaser signing a contract acceptable to the vendor.

There is no case forbidding us to place this interpretation upon these words.

In *Peacock v. Freeman*, 4 Times L.R. 541, both Mr. Justice Mathew and the Court of Appeal interpreted "sale" as meaning "sale and conveyance complete" (p. 542). But that was under a special form of contract. The Master of the Rolls pointed out that the correspondence shewed that the "sale" in this instance "could only refer to a completed sale, as they (the letters) referred to the accounts of the mortgagees being taken upon the completion of the sale and the payment of the purchase-money."

So the dictum of Bramwell, B., in *Attorney-General v. Wyndham* (1862), 1 H. & C. 563, at p. 574, "A sale supposes a seller, and also, I think, a conveyance," is upon a particular form of words—the learned Baron goes on to say, "Here there is neither."

*Robinson v. Reynolds*, 3 O.W.N. 1262, before Mr. Justice Britton, as my learned brother pointed out on the argument, is a wholly different case. There "the agent's commission" was "to be paid out of and form part of the purchase-money." The like form of words is to be found in other cases.

So, too, in a statute, "sale" has been interpreted as meaning "conveyance:" *Donovan v. Hogan* (1888), 15 A.R. 432; *Sutherland v. Sutherland* (1912), 3 O.W.N. 1368.

But "sale" and cognate words are used by the most accurate speakers and writers, both in judgments and otherwise, as mean-

ing an agreement for sale, etc., even if it be not implemented by conveyance. For example, in the case in 4 Times L.R. already cited, "sale" is used of the agreement more than once. In *Mackenzie v. Champion* (1885), 12 S.C.R. 649, "McK. *et al.* sold the land . . . receiving from the purchasers . . . \$5,000 as a deposit. . . The purchasers refused to complete their purchase . . ." (head-note). Strong, J. (p. 656), says that the plaintiffs being instructed by the defendants to sell certain lands at a certain price and upon certain terms of payment, "the only duty undertaken . . . was to find a purchaser for the price and on the terms to which they were limited by their instructions, and that it was not incumbent on them to do more than to bring the parties together, which they did and thereby earned their commission." Henry, J., dissents, but on the ground that the plaintiffs "took no accountable document to complete the sale" (p. 659). The learned Judge adds (p. 661): "If he had taken a written agreement from the purchaser the sale would be completed." This, of course, was done in the case at bar.

It is wholly unnecessary, in my view, to cite cases to shew that the meaning I have set out can be given to the language of the contract—and, under all the circumstances of the case, I think it should be.

The appeal should be allowed with costs, and judgment entered for the plaintiff for \$195, interest, and costs, all on the County Court scale.

FALCONBRIDGE, C.J.:—I agree in the result.

BRITTON, J. (dissenting):—It seems to me perfectly clear that what the plaintiff and defendant both understood by the document signed by the defendant, at the instance of the plaintiff, was, that the defendant should pay the commission to the plaintiff for selling the defendant's property, 6, 8, and 10 Stanley street.

The plaintiff did not sell the property—the property was not sold.

An offer was put in, signed by a person named Heller. There is no formal acceptance of that offer. I will assume that the defendant was willing to accept it. Heller gave a cheque,

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nominally for \$200—but, for all that appears, a cheque that the defendant could not use— as, if there were funds at the bank upon which the cheque was drawn, available for payment of the cheque, payment was stopped.

The plaintiff got the defendant to endorse the cheque, and apparently got it from the defendant in payment for any commission, if any, which the plaintiff could claim; but, upon payment being refused, he took the cheque and handed it to the wife of the defendant.

The defendant apparently thought, under advice from the plaintiff—and from persons in the interest of the plaintiff—of endeavouring to compel performance by Heller of the so-called agreement. Upon reading the offer on which the plaintiff relies, I am of opinion that the defendant adopted the wiser course in not pursuing Heller under the circumstances. Considering how the plaintiff came into this transaction—how he happened to find Heller—considering how, when, and where the offer of Heller, the so-called acceptance of the defendant, and the agreement to pay the usual commission, were drawn up and signed, the true construction of the offer is, that, if a sale was actually effected—not an agreement for sale signed—the commission was to be paid.

I agree with the decision of the County Court Judge, and I would dismiss the appeal with costs.

*Appeal allowed; BRITTON, J., dissenting.*

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## [DIVISIONAL COURT.]

## WILKINSON V. CANADIAN EXPRESS CO.

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Nov. 14.

*Carriers—Express Company—Liability for Loss of Goods Received for Carriage—Limitation of—Special Contract—Want of Privity—Approval of Form by Board of Railway Commissioners—Railway Act, R.S.C. 1906, ch. 37, sec. 353—Common Carriers.*

The defendants, public carriers, were requested by the plaintiff to carry a box for him from the Grand Trunk Railway station at the city of S. to the town of G. The defendants obtained the box from the railway company, and lost it. Upon obtaining it, the defendants gave the baggage-man at the railway station a receipt therefor, which read, "Received of G.T.R. (herein called the shipper)." The receipt was for a box, contents and value not given, addressed to the plaintiff at G., which the defendants agreed to carry and deliver upon the terms and conditions endorsed on the receipt, "to which the shipper agrees." On the back were printed conditions that the agreement should extend to and be binding upon the shipper and all persons in privity with him claiming or asserting any right to the ownership of the shipment, and limiting the liability of the defendants to the value declared by the shipper, or, if no value declared, to \$50:—

*Held*, assuming that this special contract applied, that it did not bind the plaintiff, who, for the purposes of the special contract, was neither the shipper nor a person in privity with the shipper; and the defendants were liable for the whole value of the contents of the box; for they had, as common carriers, taken the plaintiff's goods without limiting their liability to him, and lost them.

Although the Dominion Board of Railway Commissioners had approved of the form of contract used by the defendants "as the only form to be used," that meant the only form of contract "impairing, restricting, or limiting the liability of" the defendants: R.S.C. 1906, ch. 37, sec. 353; and there was nothing to prevent the defendants carrying goods without limiting their liability.

Judgment of WINCHESTER, Co.C.J., reversed.

AN appeal by the plaintiff from the judgment of WINCHESTER, Senior Judge of the County Court of the County of York, in favour of the defendants, in an action for the loss of goods of the plaintiff intrusted to the defendants for safe carriage.

The County Court Judge held that the defendants' liability was, under a condition of their contract with the plaintiff, limited to \$50, the value of the goods not having been declared by the plaintiff. The defendants brought \$50 into Court, and the judgment for the plaintiff was for that sum; his claim was for \$500.

November 12. The appeal was heard by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., RIDDELL and LENNOX, JJ.

*T. N. Phelan*, for the plaintiff. The special form of contract does not apply in the present case: *Lamont v. Canadian Transfer Co. Limited* (1909), 19 O.L.R. 291. Though it is the form of contract approved by the Railway Board, yet it is not the "only"

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form which the company can use. It is the only form which it can use when restricting, etc., its liability; that is all. If, however, the company does not see fit to use it, then its liability is as a common carrier: *Corby v. Grand Trunk R.W. Co.* (1911), 23 O.L.R. 318; *F. T. James Co. v. Dominion Express Co.* (1907), 13 O.L.R. 211.

*W. E. Foster*, for the defendants. The Railway Board has approved of this form of contract as the only form to be used. See R.S.C. 1906, ch. 37, sec. 353. I also submit that the express agent was the agent of the owner: *McMillan v. Grand Trunk R.W. Co.* (1886-8), 12 O.R. 103, 15 A.R. 14, and *Grand Trunk R.W. Co. v. McMillan* (1889), 16 S.C.R. 543.

*Phelan*, in reply.

November 14. RIDDELL, J.:—The plaintiff, a clergyman living in Aylmer, had a magic lantern outfit, which had been carried on the Grand Trunk Railway to Stratford in a trunk as baggage. He left this in the baggage-room at Stratford; he went to Woodstock. From that city he wrote a letter to the "Canadian Express Company, Stratford," instructing the company to ship it from Stratford to Galt. The letter is not produced; but there is produced a letter written immediately after as follows:—

"Woodstock, June 5, '11.

"Canadian Express Co., Stratford.

"I, in my haste, dropped my previous letter in the office forgetting to enclose the check of my box. Find it enclosed with this.

"Yours, etc.

"T. J. Wilkinson."

The agent at the depot at Stratford for the defendants received these letters in due course of mail; he took the check to the Grand Trunk Railway baggage-room, paid 55 cents for warehousing charges, gave up the check, received the trunk, made out the usual receipt, and gave it to the baggage-man, who probably threw it into the waste paper basket. The receipt read: "Received of G.T.R. (herein called the shipper) 1 box said to contain (not given), valued at (not given) 100 dollars, addressed Rev. Wilkinson, Galt, which the Canadian Express Company, herein called 'the company,' agrees to carry and deliver upon the terms

and conditions on the back hereof, to which the shipper agrees, and as evidence of such agreement accepts this shipping receipt . . . For the company, A. Jones, agent".

On the back were printed certain conditions, of which the following seem to be material:—

"2. This agreement shall extend to and be binding upon the shipper and all persons in privity with him claiming or asserting any right to the ownership . . . of the shipment . . .

"3. The liability of the company upon any shipment is limited to the value declared by the shipper . . . If the shipper does not declare the value of the shipment, liability is limited to \$50 . . ."

The trunk went astray and cannot be traced: the plaintiff sues for the value thereof, claiming \$500; the defendants pay \$50 into Court, and say that they are not liable for more. The trial Judge, Winchester, Co.C.J., gave effect to this contention; and the plaintiff now appeals.

Much argument was addressed to us to induce us to hold that the special contract did not apply in the present case, and several cases were cited—amongst them: *Lamont v. Canadian Transfer Co. Limited*, 19 O.L.R. 291; *Corby v. Grand Trunk R.W. Co.*, 23 O.L.R. 318; *F. T. James Co. v. Dominion Express Co.*, 6 Can. Ry. Cas. 309, 13 O.L.R. 211; *McMillan v. Grand Trunk R.W. Co.*, 12 O.L.R. 103, 15 A.R. 14; *S.C., sub nom. Grand Trunk R.W. Co. v. McMillan*, 16 S.C.R. 543.

I do not think it necessary to decide that point, because, assuming that the contract could apply at all, it does not bind the plaintiff. The language is the language of the express company—they say, in so many words, that in that contract "shipper" means the Grand Trunk Railway Company; and the contract is in terms binding upon the shipper and privies. The plaintiff, for the purposes of the special contract, is neither the shipper—that is the Grand Trunk Railway Company—nor a person in privity with him; the plaintiff is, therefore, not within the special contract at all. What has happened is, that the defendants, on being requested to carry certain goods for the plaintiff, take it upon themselves to purport to carry them on a special contract with some one else.

They are liable, in my view, for the full value.

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We are told that the Railway Board have approved of this form as the only form to be used. This must, of course, be read as meaning the only form of contract "impairing, restricting, or limiting the liability of" the company: R.S.C. 1906, ch. 37, sec. 353. It does not mean that the company may not carry on common law terms, with no attempt made to impair, restrict, or limit its liability—*e.g.*, there is nothing to prevent the express company agreeing to pay twice the value of the goods carried, the order of the Railway Board notwithstanding. And in this case what they have done is to take the plaintiff's goods as a common carrier and lose them, without limiting their liability to him.

The evidence justifies a verdict for \$280, and I think the plaintiff should have judgment for that sum, with costs here and below.

FALCONBRIDGE, C.J., and LENNOX, J., agreed in the result.

*Appeal allowed.*

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[MIDDLETON, J.]

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"MY VALET" LIMITED v. WINTERS.

Nov. 18.

*Trade-name—Infringement—Colourable Imitation—Intention to Deceive—Injunction.*

One who has established a business reputation under a particular name has a right to restrain any one else from injuring his business by using that name or any other name only colourably different from that used or which is calculated to deceive.

The plaintiff, having for about sixteen years carried on the business of cleaning, pressing, and repairing clothing, under the name "My Valet," which was extensively advertised, was *held*, entitled to have the defendant restrained from carrying on a competing business, in the same city, under the name "My New Valet" or any other similar name only colourably different from the plaintiff's name—the evidence shewing a deliberate and in part successful attempt on the part of the defendant to trade unfairly and deceive the public into believing his business to be the plaintiff's business.

*Levy v. Walker* (1879), 10 Ch. D. 436, 447, and *Standard Paint Co. v. Trinidad Asphalt Manufacturing Co.* (1911), 220 U.S. 446, followed.  
*British Vacuum Cleaner Co. v. New Vacuum Cleaner Co.*, [1907] 2 Ch. 312, distinguished.

ACTION for an injunction restraining the defendant from carrying on business under the name "My New Valet," or any



other similar name, or any name so closely resembling the plaintiff's name as to be likely to deceive, and for damages. The plaintiff was an incorporated company. Before the incorporation, William Fountain had used the words "My Valet" in his business, and had transferred the business and the name to the company.

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November 6. The action was tried before MIDDLETON, J., without a jury, at Toronto.

*E. F. B. Johnston*, K.C., and *D. Inglis Grant*, for the plaintiff.

*J. H. Cooke*, for the defendant.

November 18. MIDDLETON, J.:—In the year 1896, William Fountain, a tailor carrying on business in Toronto, conceived the idea that a business could be profitably conducted by an establishment which would undertake to look after the customers, clothing, establishing a system of collecting, cleaning, pressing' and returning garments, and of making minor repairs: in short, of performing for each customer the services which would be rendered by a gentleman's valet, save the personal attendance. This business was established, and was extensively advertised under the name of "My Valet," coupled in many instances with the words "Fountain the Cleaner."

This business was very successful, and for a considerable time Fountain enjoyed what was practically a monopoly. His success induced rivals to establish opposition businesses; and this they undoubtedly had a right to do. In the case of some of these businesses the rivals have used the word "Valet," and this, I also think, they have a right to do, as the word is descriptive of the kind of business which is being carried on. I do not think that Fountain could acquire a proprietary interest in this word which would entitle him to monopolise it. As said by Cozens-Hardy, M.R., in *In re Joseph Crosfield & Sons Limited*, [1910] 1 Ch. 118, at p. 141: "Wealthy traders are habitually eager to inclose part of the great common of the English language and to exclude the general public of the present day and of the future from access to the inclosure"—a statement even more true of the successful trader than the wealthy trader.

While this is so, it is equally well established that a trader may not so use a word which another has attempted to appro-

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priate as to hold out to the public his business as being that of his rival. This is well stated by James, L.J., in *Levy v. Walker* (1879), 10 Ch.D. 436, 447: "It should never be forgotten in these cases that the sole right to restrain anybody from using any name he likes in the course of any business he chooses to carry on is a right in the nature of a trade-mark: that is to say, a man has a right to say, 'You must not use a name, whether fictitious or real—you must not use a description, whether true or not, which is to represent, or calculated to represent, to the world that your business is my business, and so, by a fraudulent misstatement, deprive me of the profits of the business which would otherwise come to me.' . . . An individual plaintiff can only proceed on the ground that, having established a business reputation under a particular name, he has a right to restrain any one else from injuring his business by using that name."

This statement, I think, can be amplified by adding to it "or any other name only colourably different from that used, or which is calculated to deceive."

In the recent case of *Standard Paint Co. v. Trinidad Asphalt Manufacturing Co.* (1911), 220 U.S. 446, the Supreme Court of the United States laid down the true principle very clearly: "No . . . form of words can be appropriated as a valid trade-mark which, from the nature of the fact conveyed by its primary meaning, others may employ with equal right for the same purpose. . . . The essence of unfair competition consists in the sale of the goods of one manufacturer or vendor for those of another, and this cannot be predicated solely on the use of a trade-name similar to that used by the plaintiff if such trade-name is invalid as a trade-mark. To do so would be to give the plaintiff's trade-name the full effect of a trade-mark notwithstanding its invalidity as such."

In this case the facts developed at the trial, I think, would shew a deliberate attempt on the part of the defendant to trade unfairly in the sense indicated. I think he intended to represent his business as being the plaintiff's business, and unfairly to divert to his own pocket that which was lawfully the plaintiff's; and that what he did was not merely calculated to deceive but did actually deceive, and bring about, at least in some cases, the result intended. Had he used some such name as "Winters

the Valet," his course would have been unobjectionable. I do not think that the use of the word "New" in the title which he did adopt—"My New Valet"—is sufficiently distinctive.

It is not without significance, in considering this aspect of the case, that the word "My" is common to both names. It is not a case where the defendant is merely using the descriptive word; it is a case in which he is also using another word which forms an integral part of the plaintiff's title.

*British Vacuum Cleaner Co. v. New Vacuum Cleaner Co.*, [1907] 2 Ch. 312, comes very close to this case, but it is, I think, distinguishable. There could be no monopoly of the words "Vacuum Cleaner" or "Vacuum Cleaner Company;" and the holding was that the word "New" sufficiently distinguished the defendant company from the plaintiff company, which had chosen as its descriptive word "British." I think the result would have been otherwise if the defendant company had called itself "The New British Vacuum Cleaner Company."

For these reasons, I think it proper to award the plaintiff an injunction to restrain the defendant from the use of the name "My New Valet" or any other similar name only colourably different from the plaintiff's name.

The plaintiff company has sustained some damage; I have no satisfactory evidence as to how much; and, therefore, award \$50, with the liberty to either party to have a reference at its or his risk as to costs; and I think the defendant should pay the costs of the action, including the costs of the motion for an interim injunction. If there is a reference, costs of the reference will be reserved.

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## ROBINSON v. GRAND TRUNK R.W. Co.

*Railway—Carriage of Live Stock and Person in Charge—Half Fare Privilege—Injury to Person—Negligence—Liability—Exemption—Special Contract with Shipper—Privity and Knowledge of Person Injured—Powers of Board of Railway Commissioners—Railway Act, R.S.C. 1906, ch. 37, secs. 284, 340.*

The judgment of LATCHFORD, J., 26 O.L.R. 437, was reversed by the Court of Appeal.

*Held.* (MAGEE, J.A., and LENNOX, J., dissenting), that the plaintiff, travelling upon a freight train in charge of a horse, paying no fare himself, and having no other ticket or other authorisation entitling him to be upon the train, could not be heard to deny that he was travelling under the provisions of the special contract which was in his possession, one of which provisions exempted the defendants from liability for injury to the person carried under it; and this, whether he had read it or not, and whether or not his signature had been placed upon the back of it; and, therefore, he was bound by the provision referred to.

*Held.* also, that the Dominion Board of Railway Commissioners had power, under sec. 340 of the Railway Act, R.S.C. 1906, ch. 37, to authorise the form of special contract excluding liability of the defendants for death, injury or damage, whether caused by the negligence of the company or its servants or employees, or otherwise howsoever.

Sections 284 and 340 of the Railway Act, considered.

APPEAL by the defendants from the judgment of LATCHFORD, J., 26 O.L.R. 437, in favour of the plaintiff, holding the defendants liable for damages for injuries sustained by the plaintiff, while travelling at a reduced fare upon a train of the defendants, owing to negligence of the defendants, notwithstanding the terms of a contract purporting to exempt the defendants from liability.

September 26. The appeal was heard by GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A., and LENNOX, J.

*D. L. McCarthy*, K.C., for the defendants, argued that the plaintiff was either travelling under the contract, in which case he was bound by its terms; or he was a trespasser, in which case the defendants owed him no duty, except not to injure him wilfully, of which there was no suggestion. He referred to *Goldstein v. Canadian Pacific R.W. Co.* and *Robinson v. Canadian Pacific R.W. Co.* (1911), 23 O.L.R. 536; *Heller v. Grand Trunk R.W. Co.* (1912), 25 O.L.R. 488; the Railway Act, R.S.C. 1906, ch. 37, sec. 284, subsec. 7; Elliott on Railroads, 2nd ed., vol. 3. p. 905, citing *Boering v. Chesapeake Beach R.W. Co.* (1904), 193 U.S. 442, a case almost identical with the case at bar.



*R. McKay*, K.C., for the plaintiff, argued that the contract was not binding on the plaintiff, not having been signed or assented to by him, or brought to his notice. The action is founded on tort, not on contract, and on the authorities the plaintiff is entitled to recover. The cases are collected in *Jennings v. Grand Trunk R.W. Co.* (1887), 15 A.R. 477, at p. 484. Reference was made to *Marshall v. York, &c., R.W. Co.* (1851), 11 C.B. 655, 662, 663; *Richardson Spence & Co. v. Rowntree*, [1894] A.C. 217; *Henderson v. Stevenson* (1875), L.R. 2 Sc. App. 470; *Bate v. Canadian Pacific R.W. Co.* (1889), 18 S.C.R. 697; *Parker v. South Eastern R.W. Co.* (1877), 2 C.P.D. 416. The obtaining of the plaintiff's signature to the contract was a material step, and the failure to do so made it of no effect, as far as he was concerned. The provision of the Railway Act, sec. 340, under which the Board may determine the extent to which the liability of the company may be "impaired", does not extend to relieving the company from liability altogether—see the *Heller* case at p. 490,—and sec. 284 remains good. *Sutherland v. Grand Trunk R.W. Co.* (1909), 18 O.L.R. 139, was also referred to.

*McCarthy*, in reply, referred to *Bicknell v. Grand Trunk R.W. Co.* (1899), 26 A.R. 431, and to *Taylor v. Grand Trunk R.W. Co.* (1902), 4 O.L.R. 357.

November 19. GARROW, J.A.:—The action was brought by the plaintiff to recover from the defendants damages caused to the plaintiff while upon a railway train on the defendants' line of railway. The injury was caused by a collision with another train; and negligence in operating the train is admitted. The jury assessed the damages at \$3,000.

The only question upon this appeal arises out of the circumstances under which the plaintiff was upon the train at the time of the injury complained of, which are very similar to those recently before this Court in *Goldstein v. Canadian Pacific R.W. Co.*, 23 O.L.R. 536, even to the circumstance that the blank for the signature of the person travelling with the animal had here, as there, been left unsigned. There is, however, this circumstance which should be mentioned; in the *Goldstein* case it did not appear that any fare was paid or intended to be paid by the shipper for the carriage of the attendant; while in this case a reduced fare was charged and paid by the consignee.

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The view of Latchford, J., is thus expressed: "I am firmly of the opinion that Robinson's common law rights against the defendants were not taken away by the contract made between the defendants and Dr. Parker. Any other view appears to me necessarily to imply that, by a contract to which he was not a party, under which he derived no benefit—the reduction in fare benefiting only the consignee—and of whose terms he had neither notice nor knowledge, his right to be carried without negligence on the part of the defendants was extinguished, and they were empowered, without incurring civil liability, to maim and almost kill him while he was lawfully upon their train. If such can possibly be the effect of the special contract, a higher Court must so decide."

In the *Goldstein* case, the main question was as to the right of indemnity which the defendants claimed against the third parties. And in considering that question I incidentally referred to the nature of the contract under which the plaintiff was travelling at the time of his injury, and indicated my opinion of its proper construction as far as the then plaintiff was concerned: see 23 O.L.R. at p. 539.

Further consideration in this case, in which the question is, of course, more directly involved, has only served to confirm what I there expressed, that a person in the position of the plaintiff, travelling under such special circumstances, paying no fare himself, and having no other ticket or other authorisation entitling him to be upon the train at all, cannot be heard to deny that he was travelling under the provisions of the contract in his possession, whether he had taken the trouble to read it or not. And the result would, in my opinion, be the same whether or not the signature of such person upon the back of the contract, in the blank for that purpose, had been obtained. Such signature is clearly not essential to the creation of the contract, its only use being obviously for the purpose of identification and to prevent any one else from travelling upon it.

I am not quite certain what is meant in the judgment by the "common law rights" of the plaintiff, to which the learned Judge thought he might be remitted. He cannot, of course, have meant a common law right to travel free, or at a reduced fare, upon the defendants' railway; for, of course, no such right exists or ever

existed. The only other common law right which occurs to me is the ordinary right of every one to be protected against negligence. But negligence in such connection does not mean abstract negligence, but negligence under circumstances which imposed upon the negligent one a duty not to be negligent. And the nature and extent of this duty is not a fixed and definite quantity applicable to all alike, but varies according to the circumstances. For instance, a passenger who has paid his fare and has a ticket is legally entitled to assert a higher and more extensive duty in his case than has a mere trespasser, who has paid no fare and has no contract. So that the fundamental inquiry into the nature and extent of the duty does not stop short at the point where the plaintiff is merely found to have been upon the defendants' train, but must involve and include the further question of how and by what authority he came to be there, with the inevitable result, as it seems to me, that the contract is thus reached, and must be received and acknowledged as the foundation and the measure of the rights, duties, and liabilities of all parties, the plaintiff included. The shipper, under such a contract as the one in question, may himself accompany the animals, or he may name a person to do so, who becomes, in the language of the contract, his "nominee." No one accompanying the animals is apparently compelled to accept the privilege of travelling under such a special contract at reduced fare, or no fare at all. Instead it is quite open to the person to purchase in the ordinary way the regular ticket, paying the regular fare, in which case he would be entitled to the rights of an ordinary passenger.

But, if the travelling is done under special contract, and at the reduced fare, or no fare, as the case may be, its terms must, I think, be equally binding upon the shipper, if he alone accompanies the animals, or upon his nominee, if he does not.

And, as the contract in question clearly excludes liability on the part of the defendants for the death, injury or damage, whether "caused by the negligence of the company or its servants or employees, or otherwise howsoever", and has been duly authorised by the Railway Board, under sec. 340 of the Railway Act, R.S.C. 1906, ch. 37, the only remaining question must be the important one whether the Board has authority in the premises.

And that question I would answer in the affirmative.

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The language of the section is:—

“No contract, condition, by-law, regulation, declaration or notice made or given by the company, impairing, restricting or limiting its liability in respect of the carriage of any traffic, shall, except as hereinafter provided, relieve the company from such liability, unless such class of contract, condition, by-law, regulation, declaration or notice shall have first been authorised or approved by order or regulation of the Board.

“(2) The Board may, in any case, or by regulation, determine the extent to which the liability of the company may be so impaired, restricted or limited.

“(3) The Board may by regulation prescribe the terms and conditions under which any traffic may be carried by the company.”

“Traffic” is interpreted to mean “the traffic of passengers, goods and rolling stock.” sec. 2 (3). And “goods,” by clause (10) of the same section, as “personal property of every description that may be conveyed upon the railway, or upon steam vessels, or other vessels connected with the railway.”

Section 284, which I need not quote at length, should also be looked at. It prescribes for “accommodation for traffic,” and, among other things, for “with due care and diligence” receiving, carrying and delivering traffic. And sub-sec. 7 gives to “every person aggrieved by any neglect or refusal of the company to comply with the requirements of this section,” but “*subject to this Act*,” “an action therefor against the company, from which action the company shall not be relieved by any notice, condition or declaration, if the damage arises from any negligence or omission of the company or of its servant.” The omission from this sub-section of the word “contract” should also be noted, a word found in sec. 340 in connection with the other words here used—with the additional words, “by-law, regulation.”

In the well-known *Vogel* case, *Grand Trunk R.W. Co. v. Vogel* (1886), 11 S.C.R. 612, two of the learned Judges, Strong, J., and Taschereau, J., were of the opinion that a similar provision, without the words “subject to this Act,” and without any provision, in the legislation as it then stood, equivalent to the present sec. 340, did not prohibit a railway company from entering into a special contract limiting its liability even for the consequences of its



own negligence. And a similar opinion was expressed in this Court by Burton, J.A.: see *Vogel v. Grand Trunk R.W. Co.* (1884), 10 A.R. 162, 171, 172; and in effect by Patterson, J.A., at p. 183. That was before the days of the Railway Board, when efforts unduly to limit their responsibilities as common carriers were not infrequent on the part of railway companies, by means of "notices, conditions, and declarations," to which it could not be said that the consignees were parties otherwise than through an often doubtful notice of some kind. See the history of such efforts in the judgment of Strong, J., in the *Vogel* case, at p. 629 *et seq.*

Now, after the matter had repeatedly arisen in the Courts and formed the subject of much expensive litigation—see, among other cases, *Grand Trunk R.W. Co. v. McMillan* (1889), 16 S.C.R. 543, 559; *Robertson v. Grand Trunk R.W. Co.* (1895), 24 S.C.R. 611; *St. Mary's Creamery Co. v. Grand Trunk R.W. Co.* (1904), 8 O.L.R. 1—the policy of the legislation, which received its present form in the year 1903 (see 3 Edw. VII. ch. 58, sec. 275 (D.)), apparently is, to remit the question of what is a fair and reasonable contract between the carrier and the shipper to the Railway Board.

Such a policy, tending to secure reasonableness and justice between the parties, as well as definiteness and certainty in contracts which from their former obscurity were so often the subject of litigation, is, I think, wise and useful, and entitled to receive a liberal interpretation for the purpose of enabling it to accomplish its obvious purpose. And, so regarding it, I have no hesitation in holding that the contract in question was one the approval of which was well within the powers of the Board.

I would, for these reasons, allow the appeal and dismiss the action with costs.

MACLAREN, J.A.:—I agree.

MEREDITH, J.A.:—The learned trial Judge thought that the plaintiff might recover upon his common law rights; but has not made it very clear just which common law right he had in mind. Of course, if the plaintiff were within his legal rights in being upon the defendants' property, as he was, at the time of his injury, and if the defendants' "common law" liability were not in any way limited, he would have a right of action. But his rights, however

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they are put, must be measured by the duty the defendants owed to him; and that duty must depend upon his right to be where he was when injured. If he were a trespasser, he would have no right of action; because the defendants would not owe any duty to him in regard to the running of their train; and in the facts of this case, unless he was a passenger under the contract made by his master for his carriage, which contract he carried with him as evidence, and the only evidence, of his right of transportation, he was a trespasser, and cannot recover: and by the explicit terms of that contract the defendants are relieved from liability for the injury sustained, unless the law renders a contract for such relief ineffectual.

So it really all comes back to a question of the contract under which the plaintiff was rightly upon the defendants' property when he was injured.

The contract relieving the defendants from such liability was made in the plaintiff's presence, by his master, and the evidence, in writing, of such contract was then given to the plaintiff and always afterwards retained by him as his authority for being upon the defendants' property and as evidence of his right of transportation. Upon the face of the contract were printed in red ink and in large letters the words "Read this Special Contract;" and in the body of the "contract" the limitations of liability were headed by the words "Restrictions of Company's Liability;" under which the defendants were relieved from liability for the injury the plaintiff has sustained, in these plain words: "In case of the company granting to the shipper or any nominee or nominees of the shipper a pass or a privilege at less than full fare to ride on the train in which the property is being carried, for the purpose of taking care of the same while in transit and at the owner's risk as aforesaid, then as to every person so travelling on such a pass or reduced fare the company is to be entirely free from liability in respect of his death, injury, or damage, and whether it be caused by the negligence of the company, or its servants or employees or otherwise howsoever."

It therefore appears to me to be quite plain that the plaintiff has no legal cause of action against the defendants in this case, unless by law they are prohibited from so limiting their liability; and I am unable to say that they are now so prohibited.

By section 284 of the Railway Act, railway companies are required to, among other things, "with due care and diligence, receive, carry and deliver" all traffic offered for carriage on the railway; and, under sub-sec. 7 of that section: "Every person aggrieved by any neglect or refusal of the company to comply with the requirements of this section shall, subject to this Act, have an action therefor against the company, from which action the company shall not be relieved by any notice, condition or declaration, if the damage arises from any negligence or omission of the company or of its servant."

Then section 340 of the same Act proceeds to deal with the same subject, in these words (as set out in the judgment of GARROW, J.A., *supra*.)

When the present Railway Act was passed, the law in this respect was not in a very logical or satisfactory state. The holding of the Courts then was, that, though a railway company might not relieve itself from liability for negligence altogether, it might limit the amount of such liability. I speak, of course, in very general terms.

Then, when Parliament dealt with the question in passing the present Act, they seem to me, in the two sections from which I have quoted, to have solved the difficulty by leaving it to the Board of Railway Commissioners to determine under sec. 340, and, until that was done, to keep the old law in force under sec. 284. Thus reading these enactments gives effect to each, without any clashing in any respect, is in accord with the literal interpretation, and is just what one might have expected would have been done in the circumstances I have mentioned.

Sub-section 7 of sec. 284 is expressly made "subject to this Act", and so subject to sec. 340: and was necessary in order to maintain the law as it was, unless or until the Board should act under the latter section: and, generally speaking, putting the duty upon the Board was quite in accord with the purpose of Parliament in creating that Board, and in line with the other duties and powers given to it: see *Hayward v. Canadian Northern R.W. Co.* (1906), 4 W.L.R. 299; *Sheppard v. Canadian Pacific R.W. Co.* (1908), 16 O.L.R. 259; and *Sutherland v. Grand Trunk R.W. Co.*, 18 O.L.R. 139.

And, it being admitted that the Board had, long before the

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occurrence in question, acting under sec. 340, authorised the condition which I have quoted, the respondent's case fails in this respect also.

I would allow the appeal and dismiss the action.

LENNOX, J. (dissenting):—I think the appeal should be dismissed with costs.

I cannot agree with the argument so strenuously urged that the plaintiff must have occupied one or other of these alternative positions, namely: he was travelling as a trespasser; or, still worse, he was travelling upon and bound by the terms of what is called the "special contract."

This is not necessarily true. There is possible intermediate ground between these extremes; and, in my judgment, the undisputed facts clearly shew that the plaintiff occupied this intermediate position, that is, he was "lawfully upon the train," but he had neither notice nor knowledge of nor was he bound by the alleged special contract.

Parker, the shipper, swore:—

"I went down to the agent at Milverton to find out when I could get a car, and he asked me who was going with the horse. I says, 'I am not going to send anybody.' He says: 'We won't accept it unless you do; the rules of the company demand that a horse going over 100 miles, a person will have to accompany it.' I said, 'That is a horse of a different colour;' and a day or two afterwards I urged him to bring things to a head, because I wanted to get away on some business, and he wired me that he was going to send a man down. It was loaded up, and you know the rest.

"Q. You had no previous experience in shipping horses?  
A. No.

"Q. What did you do? A. I took the advice of this fellow who had experience.

"Q. But what did you do? A. I got a man to board off the end of the car for hay and that sort of thing. I was very well acquainted with Mr. Burgman, a reputable citizen, and I took his advice and did everything he advised me to do. In regard to the bill in question, there is a statement here that my name is signed to it. I remember signing some document; and, as the plaintiff has said, Mr. Burgman folded it up and shoved it across



on the counter, and says 'That is yours.' I folded it up and said, 'I had better mail this to Dr. McCombe;' and he says 'No; better give it to this gentleman, for he will need it to indicate that he is accompanying the horse;' and I gave it to him, and that is the last I saw of it until to-day."

The defendants, as they had a right to do, insisted upon having a man accompany the shipment; and, in consequence, McCombe sent the plaintiff to Milverton to bring back the horse.

The plaintiff's evidence is:—

"Q. Coming down to the time you went down to Milverton, tell us the circumstances preceding your trip there? A. I left South River to go to Milverton to bring up a horse which Dr. Parker was purchasing there for Dr. McCombe, and I went there and saw Dr. Parker, and we drove out and saw several horses. Dr. Parker purchased a horse, and we loaded it on the car, and I left Milverton with the horse in the car, for home.

"Q. For your home? A. For my home.

"Q. Did you have anything handed to you? A. I had nothing. Well, I had a shipping bill handed to me.

"Q. And that is what has been referred to, and will be referred to, as this contract, this special contract? A. I believe so.

"Q. What did you do with it? A. I did not know it by that name. I put it in my pocket.

"Q. Did you do anything with it before putting it in your pocket? A. I did not.

"Q. How was it handed to you? A. It was handed to me by Dr. Parker; I would not swear just to be sure that it was Dr. Parker, or the agent, but I think it was Dr. Parker.

"Q. In what shape? A. Folded up.

"Q. You did what when it was handed to you? A. Put it in my pocket.

"Q. When did you first see that contract after that time? A. It was about a week after I was home, and I was running through my pockets one day, and thought Dr. McCombe should have had that, as he was shipping the horse, and I sent it down to Dr. McCombe."

On cross-examination the plaintiff said:—

"Q. Did Dr. Parker sign this in your presence? A. I was standing right there, alongside Dr. Parker.

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"Q. What did Dr. Parker say after he had signed the contract? A. He folded the contract up and said he would send that to Dr. McCombe by mail, and 'It will be there before you will be there,' and he says: 'No; you must give it to this man; he must carry it with him; and it shews that he is travelling with this car.' They just handed it to me, and I put it in my pocket.

"Q. And you never discovered it until after the accident? A. No.

"Q. You did not read it? A. No, sir, not until after the accident.

"Q. You paid no fare on the train going with the horse? A. No.

"Q. That is all you know of the transaction; you stayed with the horse all the way? A. I travelled with the horse all the way.

"Q. And the horse was on the same train as you were at the time of the accident? A. Yes, sir.

"Q. You were not asked for any fare by the trainmen? A. No.

"Q. And you were recognised as travelling with the horse? A. Certainly.

"Q. You were in charge of the horse, looking after it from time to time? A. Yes, at times.

"Q. The way-bill shewed you were in charge of the horse? A. I don't know anything about that.

"Q. You did not see the way-bill? A. I would not say that I did not see it. I saw the conductor in the caboose, with several bills.

"Q. Did he ask you were you the man in charge of the horse? A. No.

"Q. You were the only man there? A. I was the only man there?

"Q. And the only horse? A. Yes.

"Q. I presume he looked upon you as in charge of the horse? A. I presume so."

Clearly then, whatever may be argued as to his being barred from recovery by the contract signed by Parker, and I will deal with that later, the plaintiff was not a trespasser. On the contrary, the plaintiff accompanied the shipment, not only with the knowledge and approval, but at the instance, of the company's agent at Milverton—the agent acting in pursuance of the specific

rules of the company—and this agent of the company, well knowing the provisions of the agreement, sent him out upon his journey without a suggestion of any kind that the company's liability for negligence was limited or restricted in any way whatever. It is enough in this case that the plaintiff was "rightfully" upon the train—that he was there with the consent of the company. The plaintiff was injured by a collision. It is admitted that this was caused by the negligence of the company's servants. A bare licensee may not recover for negligent omission, or nonfeasance, whereas a bailee for hire or passenger can recover in such a case. The distinction is thoroughly discussed in *Blackmore v. Toronto Street R.W. Co.* (1876), 38 U.C.R. 172, and the plaintiff, claiming damages for the death of a newsboy, a mere volunteer upon the train, failed because there was an absence of what is frequently called "active" negligence; but even in that case it was conceded on all hands that it would have been otherwise had there been any misfeasance causing the accident. At p. 210, Hagarty, C.J., said: "It seems to me, with great deference, that in the Court below the distinction has not been sufficiently pressed between an injury arising from such a defect as the want of a step, and an injury from careless driving, or collision, or any other negligence in the act of carrying." That the plaintiff here was accepted as a passenger, I consider, is beyond question; but there is no object in elaborating this point, as there is no distinction in the liability of the company when the negligence is of the active kind.

For a direct authority shewing that negligence causing a collision is misfeasance and "active" negligence, see *Allen v. Canadian Pacific R.W. Co.* (1909), 19 O.L.R. 510, where the English cases are collected, and the same case in appeal (1910), 21 O.L.R. 416.

In *Meux v. Great Eastern R.W. Co.*, [1895] 2 Q.B. 387, the contract was with the servant, the plaintiff was his employer, and the livery destroyed was hers—and it was held that, the cause of action, as in nearly all these cases, arising *ex delicto*, and the carelessness of the defendants' servant being shewn, it was enough that the plaintiff's goods were lawfully on the defendants' premises.

In *Marshall v. York, etc., R.W. Co.*, 11 C.B. 655, the position was reversed. Here the contract was made with the master, and the servant was injured, brought action, and recovered.

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Once it is shewn that the persons injured or their goods were permitted by the company to be in the place where the injury is sustained, and the negligence is of the class here complained of, the company is liable. The most direct case I have come upon in our own Courts is *Jennings v. Grand Trunk R.W. Co.*, 15 A.R. 477. This case is important, too, as to the effect of an attempt of the employer to bind the employee. At p. 483, Osler, J.A., said: "We need not, therefore, decide whether notice to the deceased of the terms of the agreement with his employers, was essential to be proved in such an action as this, as the learned Chief Justice at the trial held that it was. My present impression is, that if the case turned upon the effect of the agreement of the 1st January, 1874, this ruling was correct. . . . There being then, as I hold, no agreement that the deceased should travel at his own risk, it is not material in an action like this, that there was no contract of carriage between him and the railway company. He was lawfully on their train as a passenger with their assent, or under some agreement, express or implied, between them and the express company, and a duty was thereby cast upon the railway company to carry him safely." The learned Judge then points out that, there being no contract between the deceased and the defendants, the defendants owed no duty *ex contractu*; and, consequently, there could be no cause of action for nonfeasance. "But," he adds, "there would be that duty which the law imposes on all, namely, to do no act to injure another."

To the same effect are the judgments of Bramwell, L.J., and Baggallay, J., in *Foulkes v. Metropolitan District R.W. Co.* (1880), 5 C.P.D. 157; and the decision in *Austin v. Great Western R.W. Co.* (1867), L.R. 2 Q.B. 442.

In *Martin v. Great Indian Peninsular R.W. Co.* (1867), L.R. 3 Ex. 9, Baron Channell held that, so long as the injury complained of was "in the nature of an affirmative act," the plaintiff was entitled to recover. The contract was with the Government, and there was a special provision exempting the company from liability for negligence.

In *Collett v. London and North Western R.W. Co.* (1851), 16 Q.B. 984, the plaintiff was an officer, and the contract was with the Postmaster-General.

In *Sheerman v. Toronto Grey and Bruce R.W. Co.* (1874),



34 U.C.R. 451, Mr. Justice Wilson put his judgment upon the ground that "the deceased . . . was not there by fraud, nor as a trespasser . . . knowingly violating in the use of the car the purposes for which the defendants say it was only to be used; and he was, therefore, entitled as a matter of duty to be carried safely and securely by the defendants."

And, in delivering the judgment of the Supreme Court of the United States in *Philadelphia and Reading R.R. Co. v. Derby* (1852), 14 How. 468, Mr. Justice Grier, at p. 485, said: "If the plaintiff was lawfully on the road at the time of the collision, the Court were right in instructing the jury that none of the antecedent circumstances, or accidents of his situation, could affect his right to recover." In that case the plaintiff was paying no fare and was riding on the invitation of the president of the company.

Clearly then, I think, the first alternative is disposed of; the plaintiff was not a trespasser—he was rightfully upon the railway—and he is entitled to recover for the class of negligence here complained of, unless the defendants have effectively contracted themselves out of liability.

Then taking up the contract. Throughout the argument there seemed to be an undercurrent of suggestion that the plaintiff might in some mysterious way be bound by estoppel. What foundation is there for this? Brought out into the open, it means that he was bound by contract—bound by the special contract—or he is not bound at all. Here the plaintiff was never asked to make a contract, never authorised the making of one on his behalf, and never knew that there was a contract on his behalf. Did he not know or understand that his passage would be arranged for? Yes, but that would be a contract on behalf of McCombe; and, until he was told otherwise, he had no reason to anticipate special conditions or that he was being contracted out of his rights. And a great deal of stress was laid on the fact that this form of contract was approved by the Board. There is no magic in this. The question is not whether such a contract, *if made*, is binding, but whether such a contract, so far as the plaintiff is concerned, was made at all. The Board sanctions certain contracts, *if made*. It does not bring contracts into being, or dispense with the common law essentials—communication, knowledge, consent, and the like. Are these conditions in evidence in this case? Neither

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McCombe, who employed the plaintiff, nor his agent Parker, could, without express authority from the plaintiff, trade away his right to be carried safely, or indemnified in case of default; and Parker never bargained, or intended, and the company never asked Parker to bargain, to do so. Parker never read the agreement, and no word about reduced rates, option, special terms, or exoneration, was ever uttered to anybody. Indeed, if it were necessary to decide as to the effect of this document, even as against McCombe—for Parker has no interest in it—it might be difficult to determine in favour of its validity, seeing that the initial condition exacted by the Board, namely, an option afforded to the shipper to retain his ordinary remedy against the company if he desired, was entirely ignored—a condition, as I understand it, which must exist as a matter of fact, as a foundation, before such a contract as this can be entered into at all. If McCombe was not bound, it could hardly be binding upon the plaintiff. Be this as it may, at all events, to the plaintiff, so vitally interested in the company's proposal, it was never hinted that his rights as a passenger were being affected in any way, although he was within easy reach of the agent, and although the drastic provisions of this contract, and the exceptional risk of travel upon a freight train, must have been present to the agent's mind. Instead, he prevented the possibility of the plaintiff making the discovery, by neglecting the statutory condition of requiring signature. To the man who already knew of the contents of the contract, the signing might be immaterial, but it is a part of the sanctioned contract; it is to be strictly observed; and, when it comes to the case of a man who does not know the facts at all, it cannot be said to be unimportant. It was folded up—the conductor never asked for it—the plaintiff never read it. The agent should have informed him of its contents if he intended him to be bound. There is no special rate filled in, although there is a blank space left for it—the marginal reference to half fare is of the vaguest kind; and on this condition, and finding that there is no entry on the back where the name of the reduced fare passenger, if any, is to appear, if the plaintiff had read this agreement he would be quite likely to conclude, and I think not unreasonably, that no arrangement for reduced fare had been made. He could pay a full fare without the personal loss of a farthing. If either the agent or conductor

had done his duty, this plaintiff might have been put upon his guard, and if the real situation, proposed, had ever become known to him, is it conceivable that he would have bartered away his protection for less than a mess of pottage—in fact have surrendered his rights against the company without advantage of any kind?

I am of opinion that the judgment of the learned trial Judge should be affirmed.

MAGEE, J.A., also dissented, agreeing with the opinion of LENNOX, J.

*Appeal allowed; MAGEE, J.A.,  
and LENNOX, J., dissenting.*

[IN THE COURT OF APPEAL.]

MCCLEMONT V. KILGOUR MANUFACTURING CO.

*Master and Servant—Injury to Servant—Negligence—Violation of Factories Act, R.S.O. 1897, ch. 256, sec. 20(1)—Dangerous Machinery—Absence of Guard—Finding of Jury—Inconsistency—Absence of Contributory Negligence—Evidence—Nonsuit—Voluntary Assumption of Risk—Application of Maxim “Volenti non Fit Injuria” to Breach of Statutory Duty.*

The plaintiff, a foreman employed by the defendants in their box factory, after repairing a driving belt, was in the act of applying belt dressing to the inner surface of the moving belt, when his clothing was caught by the head of a set screw which projected about an inch from the outer face of a collar or disc upon and near the end of a revolving shaft, and was thrown upon the shaft and pulley, and severely injured. To do this work the plaintiff had removed the covering which guarded the set screw, and gone into the pit or open space close by the pulley. In an action for damages for his injuries, the jury found (1) that the defendants were guilty of negligence which occasioned the accident to the plaintiff, in not having the projecting set screw in the collar upon the shaft guarded otherwise than it was when the plaintiff was injured; (2) that the defendants were guilty of negligence in respect of not having a separate guard on the set screw or in not having a collar on the shaft with a counter-sunk set screw; also in not having proper appliances for applying belt dressing; (3) that the plaintiff, knowing the danger, voluntarily undertook the risk; (4) that the plaintiff could not, by the exercise of reasonable care, have avoided the accident:—

*Held*, by a Divisional Court, affirming the judgment of BRITTON, J., (1) that the jury's second finding was warranted by the evidence, and that finding, coupled with the admittedly dangerous character of the machinery, shewed a violation of sub-sec. 1 of sec. 20 of the Factories Act, R. S.O. 1897, ch. 256; (2) that, although there was strong evidence of contributory negligence, it was not so conclusive and undisputed as to warrant that question being withdrawn from the jury, nor could it be said that the finding against contributory negligence was perverse; and

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- C. A. (3) that the maxim "*volenti non fit injuria*" is not applicable in relief of a defendant guilty of a violation of a statutory duty such as is imposed by the Factories Act.
- 1911 ———
- McCLEMENT v. BADDELEY *v. Earl Granville* (1887), 19 Q.B.D. 423, and *Rodgers v. Hamilton Cotton Co.* (1893), 23 O.R. 425, followed.
- KILGOUR *Groves v. Lord Wimborne*, [1898] 2 Q.B. 402, and *Butler v. Fife Coal Co.*, [1912] A.C. 149, specially referred to.
- MFG. CO. Upon appeal to the Court of Appeal, the judgment of the Divisional Court was affirmed.
- Per* GARROW, J.A.:—The evidence of contributory negligence was not strong enough to justify withdrawing the case from the jury. The findings of the jury brought the case within the Factories Act. A breach of a statutory duty is in itself actionable, as it is also evidence of negligence. It was impossible to say that there was no evidence upon which the jury might reasonably act in reaching the conclusion that the plaintiff had justified his conduct on the occasion in question, and that the guard, as to him, in the position in which he was, was insufficient. The circumstance that the plaintiff was the foreman in charge had not the effect of depriving him of the right to invoke the provisions of the Act. Nor was it a complete answer in itself to say that the defendants had supplied a sufficient guard when in place, if in fact the guard was not in place when the accident occurred. There was some doubt whether the jury were sufficiently instructed or sufficiently understood the question put to them as to the voluntary assumption of the risk. But, assuming that their finding that the plaintiff was *volens* should stand, it was not a good answer to the finding against the defendants of a violation of the Factories Act.
- Per* MEREDITH, J.A.:—The finding of the jury that the plaintiff voluntarily incurred the risk which caused his injury was inconsistent with the finding that the plaintiff was not guilty of contributory negligence. It being the fact that the plaintiff was not negligent in getting into the box to do the work, there was no evidence that he voluntarily incurred the risk—he was doing that which it was his duty to do without incurring any greater risk than that duty made necessary. The case should be treated as if there was no finding of *volens*. Upon the jury's other findings, a clear case, under the Factories Act, was made out against the defendants.

ACTION by Charles McClement against the Kilgour Manufacturing Company, his employers, for damages for personal injuries.

October 4, 1911. The action was tried before BRITTON, J., with a jury, at Hamilton.

*W. M. McClement*, for the plaintiff.

*T. N. Phelan*, for the defendants.

December 27, 1911. BRITTON, J.:—The defendants are owners of a factory in the city of Hamilton, and were engaged in the manufacture of boxes. The plaintiff was in the employ of the defendants, and while at work in their factory on the 17th day of February, 1911, was accidentally injured. The cause of the accident was, that the plaintiff's clothing was caught by the head of a set screw which projected about one inch from the



outer face of a collar or disc upon and near the end of a revolving shaft—a part of the defendants' machinery. The plaintiff charges negligence in that the defendants did not have this head of the set screw counter-sunk or in some way guarded against contact with any workman or his clothing when such workman was near the revolving shaft. The undisputed facts are briefly these.

A couple of years ago—more or less—an accident happened to a boy working for the defendants in the same shop, and by reason of his being caught by the same, then unguarded, set screw. After that accident, the defendants did put a guard-box or case upon and over this collar or disc, completely covering both collar and head of set screw.

The plaintiff is an intelligent and competent workman. He was foreman of the men and of the work on the floor of that part of the factory where the former accident happened and at the time it happened. The plaintiff has continued to be foreman and to have an oversight of the work being done and of the machinery, including the shaft, pulley, belting, and set screw, and was so when the accident happened to him.

An employee of the defendants while at work on the machine in question had his driving belt break. He could not repair it himself, so he took it to his foreman, the plaintiff. Before repairing the belt, the machinery had to be stopped. The plaintiff removed the covering which guarded the set screw. With this covering on, the plaintiff could not have been injured in the manner in which he was injured. The plaintiff then went into the pit or open space close by the pulley, and close to the orbit of the projecting head of the set screw. Having repaired the belt, the plaintiff, without putting the guard or protecting box back in place, started the machinery, and, with the belt in place and the guard not in place, applied belt dressing to the inner surface of the moving belt. While he was doing this, the plaintiff's clothing was caught by the projecting head of the set screw, he was thrown upon the moving shaft and pulley, and was severely injured.

Upon that state of facts, counsel for the defendants, at the close of the plaintiff's case, moved for a dismissal of the action. I reserved my decision, and decided to submit questions to the jury.

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The motion for dismissal was renewed after evidence for the defence had been put in.

The questions put to the jury, with their answers, are as follows:—

(1) Were the defendants guilty of any negligence which occasioned the accident to the plaintiff, in not having the projecting set screw in the collar upon the shaft in the defendants' factory guarded otherwise than it was guarded when the plaintiff was injured? A. Yes.

(2) If so, in what respect were the defendants so guilty? A. In not having a separate guard on set screw or in not having a collar on shaft with a counter-sunk set screw. Also in not having proper appliances for applying belt dressing.

(3) Did the plaintiff know and appreciate the danger of the work at which he was employed at the time the accident happened, and did he, knowing the danger, voluntarily undertake the risk? A. Yes.

(4) Could the plaintiff, by the exercise of reasonable care, have avoided the accident? A. No.

(5) Amount of damages? A. \$1,000.

There was no evidence that the guard when over the set screw was insufficient, and it was only unguarded when put in that condition by the plaintiff himself. The plaintiff's contention was, that it was part of his work to apply belt dressing, and this should be done when the belt was on and the machinery in motion—that it was reasonably necessary for any person, in applying this belt dressing, to go into the pit, close beside the shaft; and to go into that place it was necessary to remove the usual set screw guard, and that it was negligence on the part of the defendants not to have the head of the set screw guarded against danger to the workmen, when on duty in the place mentioned and when the machinery was in motion. There was evidence that the head of the set screw could have had a guard for the protection of workmen in the pit when the machinery was in motion, or that the head of the screw could have been counter-sunk.

The question of sufficiently guarding, or of guarding the machinery "so far as practicable," is one of fact, and, therefore,

is for the jury; so the defendants' motion for dismissal of the action cannot prevail.

Then as to contributory negligence. There certainly was very strong evidence of that, but I cannot say that it was so conclusive and undisputed as to have it withdrawn from the jury. There was evidence that there was another way of applying the belt dressing.

The defendants also contend that upon the answer of the jury to the third question the defendants should have judgment.

The authorities cited by the plaintiff's counsel—viz., *Dean v. Ontario Cotton Mills Co.* (1887), 14 O.R. 119; *Rodgers v. Hamilton Cotton Co.* (1893), 23 O.R. 425; and *Love v. New Fairview Corporation Limited* (1904), 10 B.C.R. 330—are against the defendants.

The maxim "*volenti non fit injuria*" does not apply when an accident is caused by the breach of a statutory duty.

The finding of the jury of negligence in not having proper appliances for applying the belt dressing may be entirely disregarded. There was no charge in the statement of claim or in the evidence of any such negligence. There was evidence that it was possible and practicable to have a counter-sunk set screw or to have the set screw further guarded.

The case is certainly very close to the line upon the two questions: first, as to there being any evidence of negligence or breach of the Factories Act which should properly be submitted to the jury; second, as to there being conclusive evidence of contributory negligence on the part of the plaintiff; but, in the view I take, the case could not have been withdrawn from the jury.

There will be judgment for the plaintiff for \$1,000 with costs.

The defendants appealed from the judgment of BRITTON, J., to a Divisional Court.

February 27, 1912. The appeal was heard by a Court composed of MEREDITH, C.J.C.P., TEETZEL and KELLY, JJ.

*T. N. Phelan*, for the defendants.

*W. M. McClemont*, for the plaintiff.

April 10, 1912. The judgment of the Court was delivered by TEETZEL, J.:—The action was for damages under the Work-

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men's Compensation for Injuries Act, the negligence relied upon being a breach of the Ontario Factories Act in not guarding dangerous machinery.

[The learned Judge then set out the questions left to the jury and their answers, as above.]

The grounds of appeal chiefly relied on by Mr. Phelan were:—

(1) That there was no evidence of negligence to warrant the case being submitted to the jury; and, if there was any negligence, it was that of the plaintiff, who failed in his duty as foreman, within the meaning of sec. 6 of the Workmen's Compensation for Injuries Act.

(2) That the evidence established contributory negligence, and that the finding of the jury on that question was perverse.

(3) That the maxim "*volenti non fit injuria*" applied; and the answer to the third question, therefore, entitled the defendants to judgment dismissing the action.

The set screw by which the plaintiff's clothing was caught, and which caused his injury, projected at least an inch and a quarter above the surface of the collar which it entered. The collar with the projecting set screw surrounds a shaft which when in operation revolves very rapidly; and, having regard to its position and use, was, unless well guarded, manifestly, when in operation, a source of danger to the defendants' employees who might be required to work near it.

The plaintiff's case is founded upon the claim that the defendants violated the provisions of the Ontario Factories Act in not, as far as practicable, securely guarding the set screw in question. The defendants had provided a box-shaped guard or covering for the whole shaft, the top of which was removable; and the principal contest at the trial centred around the question whether, under all the conditions, that guard was sufficient; and that led to the first question being put to the jury, referring to the guard which had been provided by the defendants.

Before the accident, the plaintiff removed the top of the guard in question, to enable him to place upon the belt a mixture used to prevent the belt slipping around the pulley. For that purpose, the plaintiff stepped inside the box-shaped guard; and, while he was putting on the mixture, his leg was necessarily near the collar in question, and the projecting screw caught his



trouser-leg, and he was thrown down upon the revolving pulley, and his knee-cap was shattered and other injuries inflicted.

The plaintiff swore that in order properly to do the work he undertook it was necessary for him to get inside the box, although he knew the unguarded condition of the screw.

It was also manifest from the size of the box that, while he was standing in it and putting the mixture on the belt, one of his legs would not be far from the revolving collar and screw.

There was evidence that the set screw could have been securely guarded, or sunk into the collar, so that no part would have been projecting beyond the surface of the collar; and the jury, in answer to the second question, so found—a conclusion which, I think, is warranted by the evidence. The effect of this finding, coupled with the admittedly dangerous character of the machinery, is to find the defendants guilty of a violation of sub-sec. 1 of sec. 20 of the Factories Act, R.S.O. 1897, ch. 256.

Evidence was given by the defendants that the plaintiff could have applied the mixture to the belt without getting in the box; and the jury were given a view of the machine in operation, and of tests made to apply the mixture without the operator getting in the box.

As observed by the learned trial Judge, there certainly was very strong evidence of contributory negligence; but I agree with him that it was not so conclusive and undisputed as to warrant that question being withdrawn from the jury; nor, the jury having been permitted to view the machine and the tests made to demonstrate the plaintiff's alleged negligence, can I say that the finding was perverse.

Having thus a finding, in effect, that the defendants were guilty of a violation of the Factories Act, and a finding absolving the plaintiff from contributory negligence, the effect of the jury's answer to the third question remains to be considered.

The question of the applicability of the maxim "*volenti non fit injuria*" in relief of a defendant guilty of a violation of a statutory duty such as is imposed by the Factories Act, was settled by a Divisional Court in England in *Baddeley v. Earl Granville* (1887), 19 Q.B.D. 423, where the decision was, that the defence arising from the maxim was not applicable in cases where the injury arose from the breach of a statutory duty on the part of

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the employer. Mr. Phelan cleverly criticised this decision as being at variance with the decision of the Court of Appeal in *Thomas v. Quartermaine* (1887), 18 Q.B.D. 685, and as not reconcilable with recognised legal principles; and his argument was supported by the view of Mr. Beven, in an article on the maxim, published in 13 Law Magazine, p. 19, in 1888, also in his Law of Negligence, 3rd (Canadian) ed., vol. 1, p. 644; also by Mr. Labatt, at pp. 1512-14 of his book on Master and Servant.

It is to be observed, however, that the decision has never been overruled, and is treated by the following writers as settling the law that the defence of "*volenti non fit injuria*" is not available where the injury arises from breach of a statutory duty on the part of the employer for the benefit of the workman himself and others: Underhill on Torts, 9th ed. (1912), p. 190; Clerk & Lindsell's Law of Torts, Canadian ed. (1908), pp. 518 and 522 (h); Ruegg's Employers' Liability, 8th ed. (1910), pp. 235-6; Smith's Law of Master and Servant, 6th ed. (1906), p. 209; Dawbarn on Employers' Liability, 4th ed. (1911), p. 73; and Pollock's Law of Torts, 7th ed. (1904), p. 505.

The decision has also been followed by the Courts of this country. Citing it, in *Rodgers v. Hamilton Cotton Co.*, 23 O.R. 425, at p. 435, Mr. Justice Street, in delivering judgment in a Divisional Court, says: "The principle '*volenti non fit injuria*' has been held not to apply when the accident has been caused by the defendant's breach of a statutory obligation: *Baddeley v. Earl Granville*, 19 Q.B.D. 423. And, even if applicable, the knowledge of the workman of the existence of the defect has been considered to be merely an element in the question of contributory negligence: *Thomas v. Quartermaine*, 18 Q.B.D. 685."

It has also been applied in British Columbia, by the Supreme Court, in *Love v. New Fairview Corporation Limited*, 10 B.C.R. 330; and by the Supreme Court of Nova Scotia in *Bell v. Inverness R.W. and Coal Co.* (1908), 42 N.S.R. 265.

The holding in *Groves v. Lord Wimborne*, [1898] 2 Q.B. 402, adopted in many subsequent cases, that the defence of common employment is not applicable in a case where injury has been caused to a servant by the breach of an absolute duty imposed by statute upon his master for his protection, shews the strong judicial tendency to construe and apply such provisions so as

effectually to secure the intended protection. See *Sault Ste. Marie Pulp and Paper Co. v. Myers* (1902), 33 S.C.R. 23, and *Siven v. Temiskaming Mining Co.* (1912), 25 O.L.R. 524. Lord Shaw of Dunfermline, in *Butler v. Fife Coal Co.*, [1912] A.C. 149, at pp. 178-9, said: "The commanding principle in the construction of a statute passed to remedy the evils and to protect against the dangers which confront or threaten persons or classes of His Majesty's subjects is that, consistently with the actual language employed, the Act shall be interpreted in the sense favourable to making the remedy effective and the protection secure. This principle is sound and undeniable."

This is a most interesting case and illustrates the view of the highest Court in the Empire as to the strictness with which employers of labour should be held to the observance of duties cast upon them by statute for the protection of their employees.

The judgment should be dismissing the appeal with costs.

The defendants appealed to the Court of Appeal from the judgment of the Divisional Court.

September 26 and 27, 1912. The appeal was heard by GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A., and LENNOX, J.

*T. N. Phelan*, for the defendants, argued that they were entitled to have the action dismissed, upon the jury's answer to the third question, which made the maxim of "*volenti non fit injuria*" applicable to the case. The plaintiff relies upon *Baddeley v. Earl Granville*, 19 Q.B.D. 423, to shew that the maxim is not applicable; but it is submitted that the head-note does not accurately state the effect of the case, and that it does not go the length of holding that, with proper evidence, the defence of *volens* cannot be made out. It is further submitted that the *Baddeley* case is distinguishable, because the defendants' breach of duty, if any, is not a breach of any statutory duty. In any event, the *Baddeley* case is not good law, and is not reconcilable with recognised principles laid down by leading text-writers. See the criticism written by Mr. Beven in 13 Law Magazine, p. 19, also Beven's Law of Negligence, 3rd (Canadian) ed., vol. 1, p. 644. Reference was made to *Groves v. Lord Wimborne*, [1898] 2 Q.B. 402; *Smith v. Baker*, [1891] A.C. 325; *Thomas v. Quartermaine*, 18 Q.B.D. 685. It is further submitted that there was

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no evidence of negligence to go to the jury, and that the defendants' motion for a nonsuit should have been allowed. The ultimate negligence was the plaintiff's: *Brenner v. Toronto R.W. Co.* (1907), 13 O.L.R. 423, *per* Anglin, J., at p. 433 *et seq.*

*W. M. McClement*, for the plaintiff, argued that, as the facts regarding the negligence of the defendants had been found by the jury in favour of the plaintiff, there were no grounds for a nonsuit. The doctrine of "*volenti non fit injuria*" does not apply in law when the negligence of the employer consists of a breach (as in this case found by the jury) of a statutory obligation. This is settled law, and the *Baddeley* decision has never been overruled. The effect of the case is accurately stated in the head-note, and the principle there laid down is in accordance with public policy, and the tendency of the Courts to construe and apply statutes passed for the workman's safety so as to secure effectually the protection intended for them.

*Phelan*, in reply.

November 19. GARROW, J.A.:—The negligence alleged in the statement of claim was failure to protect the plaintiff from contact with the set screw which injured him, by counter-sinking or, otherwise guarding it. And he claimed to be entitled to recover at common law and under the Workmen's Compensation for Injuries Act, and also under the Ontario Factories Act.

The only evidence given on the plaintiff's behalf was his own. At the close of his case, counsel for the defendants moved for a nonsuit; judgment was then reserved; the motion was renewed at the close of the whole case, when judgment was again reserved; the learned trial Judge afterwards delivering a considered judgment refusing the nonsuit and directing judgment to be entered, upon the findings of the jury, in favour of the plaintiff.

In the Divisional Court the judgment of Britton, J., was affirmed, practically upon the same grounds. In both Courts it was said that there was strong evidence of contributory negligence, although not strong enough to justify withdrawing the case from the jury. And in both it was apparently assumed that the findings of the jury brought the case within the Factories Act; with all of which I agree.



If a sufficient case is made out under that Act, it will not be necessary to deal with the general question of negligence; a breach of a statutory duty being in itself actionable, as it is also evidence of negligence. See *McCloherly v. Gale Manufacturing Co.* (1892), 19 A.R. 117.

I will, therefore, first consider the case as presented under the Factories Act.

By R.S.O. 1897, ch. 256, the Ontario Factories Act, sec. 20, sub-sec. 1, it is provided that "all dangerous parts of . . . machinery . . . shall be as far as practicable securely guarded;" and sub-sec. 2 declares that a factory carried on in contravention of that section shall be deemed to be kept unlawfully. There can, therefore, be no doubt about the statutory duty; it is perfectly clear. But it is not quite so clear that there was evidence of a breach. To begin with, it is admitted on all hands that with the box in place the machinery in question was securely guarded. And it is, of course, equally clear that with the box removed it at once became wholly unguarded.

Nothing, I think, turns, so far as the present inquiry is concerned, upon the circumstance that the plaintiff was not an ordinary workman, but was the foreman in charge. That alone, while important in considering the question of negligence, would not have the effect of depriving him of the right to invoke the provisions of the Act. Nor is it a complete answer in itself to say that the defendants had supplied a sufficient guard when in place, if in fact the guard was not in place when the accident occurred. See *Tate v. Latham & Son*, [1897] 1 Q.B. 502. The guard was not removed by the plaintiff, but by the witness Johnson, in order to repair the belt. What the plaintiff did was, after the belt had been repaired, while standing in the place of danger, to start up the machinery, which had been at rest, for the purpose, as he says, of applying the belt dressing. He was, of course, bound to justify this action; and to do so was, I think, obliged to shew that he acted under the orders of the defendants, either express or reasonably to be implied. See *Grand Trunk R.W. Co. v. Weegar* (1894), 23 S.C.R. 422, at p. 427.

He asserts no positive order or direction. He does not even deny the defendants' evidence that the defendants not only had

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given no such order or direction, but did not even know until the accident that the plaintiff or any one else was in the habit of doing or had ever done what the plaintiff did on the occasion in question.

The circumstances—slender, but, I incline to think, sufficient—upon which the plaintiff relies to raise the necessary implication, are that the defendants procured the belt dressing and instructed the plaintiff to use it, but gave no instructions as to the method; the occasion was one requiring its use (not disputed); he had previously repeatedly used it, always in the same way, and from the same position, and, in his opinion, there was no other reasonable way of doing it.

There was certainly evidence to the contrary as to other and safer methods, given on behalf of the defendants; evidence which, upon paper at least, seems decidedly stronger than that given by the plaintiff. But the jury had the great advantage of a view, during which an exhibition was apparently given by the witness Johnson of his method.

In view of the plaintiff's own evidence, it is not, I think, possible to say that there was no evidence upon which the jury might reasonably act in reaching the conclusion that the plaintiff had justified his conduct on the occasion in question, and that the guard, as to him, in the position in which he was, was insufficient.

The only other question requiring consideration upon this appeal is that which arises from the third finding, that the plaintiff was *volens*.

In looking at the evidence and the charge, there is at least reason to doubt if the jury were sufficiently instructed or whether they sufficiently understood the question, which is by no means an easy one. The evidence as to anything more than knowledge is very meagre. And, with deference, I think the charge, while in other respects admirable, left something more to be usefully said upon the question of the assumption of the risk by the plaintiff. His knowledge of the work, upon which the charge mainly dwelt, was really not in dispute.

But, assuming that the question should stand as answered, is it a good answer to the finding in so far as it rests upon the Factories Act? In my opinion, it is not. The point, it is ad-

mitted by the learned counsel for the defendants, was so determined by *Baddeley v. Earl Granville*, 19 Q.B.D. 423, since followed in Ontario. See *Rodgers v. Hamilton Cotton Co.*, 23 O.R. 425. That decision was given in 1887, twenty-five years ago. Since then the point—a very practical one—must have repeatedly arisen, and the case been cited; yet, in a somewhat diligent search, I have been unable to find a single case in England or here in which its authority has been doubted.

On the other hand, the Court of Appeal, in *Groves v. Lord Wimborne*, [1898] 2 Q.B. 402, in which the *Baddeley* case was cited in argument, although not referred to in the judgment, reached the conclusion—not since disputed—that the cognate defence of common employment was not applicable in a case where injury had been caused to a servant by the breach of a similar statute. There is, in my opinion, no good reason why the one should be taken and the other left. Common employment as a defence, sometimes said to rest upon an implied contract, is really a branch—or, more exactly speaking, an illustration—of the application of the maxim "*volenti non fit injuria*." The scope of that maxim is very wide, and by no means confined to the case of master and servant.

The result is that, in my opinion, the appeal fails and should be dismissed with costs.

MEREDITH, J.A.:—The jury found that the plaintiff was not guilty of contributory negligence, with which finding their finding that he voluntarily incurred the risk which caused his injury seems to me to be quite inconsistent, on the facts of this case.

One subject, and the subject of the greatest controversy at the trial, was, whether the plaintiff's manner of doing the work he was engaged in when injured, or some of the other ways deposed to by other witnesses, was the safer and better; and the jury seem to have found in favour of his way—at all events, have plainly found that it was not a negligent way, having acquitted him of contributory negligence.

Then, it being the fact that the plaintiff was not negligent in getting into the box to do the work, it follows that there was no evidence that he voluntarily incurred the risk: in short, he was doing that which it was his duty to do without incurring

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any greater risk than that duty made necessary. In doing that which his duty required him to do, and doing it in a reasonable manner, in a manner which did not increase the risk, he did not bring himself within the rule "*volenti non fit injuria*:" he was not a volunteer; that which he did was done under the requirements of his service, his duty to his master. A master who requires his servant to perform a dangerous service cannot say that it was done voluntarily merely because the servant performed the service, did his duty, instead of refusing to do it at the risk of dismissal or other disadvantage likely to follow such a refusal. If the servant do it in a negligent way, he fails because of contributory negligence, not because he voluntarily incurred the risk.

There was, therefore, in my opinion, no evidence to support the finding in this respect; and, consequently, no such question should have gone to the jury; and the case is now to be treated as if there were no such finding; with the result that the verdict and judgment in the plaintiff's favour must stand. Under all the circumstances, the jury's finding in this respect can have meant only that the plaintiff was not compelled to do the work; he might have refused to do it, but did not.

And the jury having found in favour of the plaintiff on the question of the propriety of his method of applying the paste to the belt, a clear case, under the Factories Act, is made out against the defendants; because, to any one getting into the box, that box was rather a snare to than a safeguard against the danger caused by the set screw.

I would dismiss the appeal.

LENNOX, J.:—I am of opinion that the appeal should be dismissed with costs.

MACLAREN and MAGEE, JJ.A., agreed that the appeal should be dismissed with costs.

*Judgment accordingly.*

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## [IN THE COURT OF APPEAL.]

## OTTAWA WINE VAULTS CO. v. MCGUIRE.

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*Fraudulent Conveyance—Husband and Wife—Voluntary Settlement—Sol-  
vency of Husband—Hazardous Business—Fear of Future Creditors—  
Intent—13 Eliz. ch. 5—Findings of Trial Judge—Appeal.*

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*Held*, upon the evidence, reversing the decision of a Divisional Court, 24 O.L.R. 591, restoring that of MULOCK, C.J.Ex.D., *ib.*, and agreeing with the dissenting opinion of FALCONBRIDGE, C.J.K.B., in the Divisional Court, that the voluntary conveyance made by the defendant M. to his wife, in view of the hazardous business into which he had entered, was fraudulent and void against the plaintiffs and other creditors of M.

*Per* GARROW, J.A.:—A voluntary conveyance made with intent to affect future creditors alone is within the statute 13 Eliz. ch. 5, and will be set aside.

*Mackay v. Douglas* (1872), L.R. 14 Eq. 106, specially referred to.

*Per* MEREDITH, J.A.:—The conveyance was made for the purpose of securing the property comprised in it against the grantor's creditors; to preserve it against the losses he might incur in the hazardous venture upon which he had entered. Much weight should be attached to the findings of the trial Judge in such a case as this, in which, having the advantage of seeing and hearing the witnesses and all other advantages of a trial Judge, he discredits the defendants in their testimony on the question of the *bona fides* of the transaction.

APPEAL by the plaintiffs from the judgment of a Divisional Court (FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.), reversing the judgment of MULOCK, C.J. Ex.D., at the trial, and dismissing the action; FALCONBRIDGE, C.J., dissenting.

The action was brought to set aside a conveyance of lands by the defendant John L. McGuire to the defendant Hattie McGuire as fraudulent and void against the plaintiffs and other creditors of the defendant John L. McGuire.

The reasons for the judgments of the trial Judge and of the Judges in the Divisional Court are reported in 24 O.L.R. 591, where the facts are stated.

April 18 and 19. The appeal was heard by Moss, C.J.O.,\* GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

*W. D. Hogg*, K.C., for the plaintiffs. The question is, whether or not John L. McGuire had the right to convey the Madoc property, by far his most valuable asset, to his wife, at a time when he was going into an uncertain venture. The hotel business in which he proposed to embark when he made the conveyance in question is much more hazardous than an ordinary mercantile business, and too high a value has been placed by RIDDELL, J.,

\* Moss, C.J.O., died before judgment was given.

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in his judgment in the Divisional Court, on the goodwill and other assets employed in that business. It is a case of a post-nuptial settlement made in circumstances which, apart from any fraudulent intent, do not justify it. The effect of the transaction was to defeat his creditors, as within fourteen months he was a bankrupt, owing \$8,800, with assets of \$600. The plaintiffs were continuing creditors, and fell within the rule laid down in *Ferguson v. Kenny* (1889), 16 A.R. 276. Reference was also made to *Campbell v. Chapman* (1879), 26 Gr. 240; *Jackson v. Bowman* (1867), 14 Gr. 156, *per* Spragge, V.-C., at p. 160. The question is one of appreciation of evidence, and the decision of the learned Chief Justice who tried the case, and had the defendant John L. McGuire before him on two occasions, should not be disturbed.

*G. H. Watson*, K.C., and *F. B. Proctor*, for the defendants. *Fleming v. Edwards* (1896), 23 A.R. 718, is practically conclusive in favour of the defendants, on the facts in this case. [MEREDITH, J.A.:—That was a fire case, and quite different from this.] What happened here was similar. No fraudulent intent has been found in this case. [GARROW, J.A.:—It is a question of the result, not of intent to commit an actual fraud.] The inference of fraud can only be drawn in certain circumstances which do not exist here. McGuire has not been found to have been insolvent at the time of the transfer. His purchase of the hotel business for \$8,500 was a *bonâ fide* transaction, and he had no reason to think that it was worth any less when he made the transfer of the Madoc property to his wife. *Ex p. Russell* (1882), 51 L.J.Ch. 521, 19 Ch.D. 588, is distinguishable, being a decision under English law. A most material point in the defendants' favour is, that the plaintiffs' claim is for a debt which arose since the transfer, and there is no liability now existing which was in existence at the time of the transfer. [MACLAREN, J.A.:—You omit the point as to running accounts.] That is explained by the defendant's method of closing accounts by drafts which were duly paid. A running account is one in which no settlement is struck. The plaintiffs have no status to attack the transfer: *Jenkyn v. Vaughan* (1856), 3 Drew. 419, and cases following it. The defendant's failure in his hotel business was brought about by things which he could not have anticipated, such as the expense of structural changes necessitated by the action of the license commissioners, the loss of sub-tenants,

and fire. He had no difficulty till December, 1909. There is no particular hazard in running a hotel business with a license in a city like Ottawa, where there is no probability of local option being introduced, so long as Parliament meets there. He had been an hotel-keeper all his life, and there is no suggestion that he had any bad habits. His wife had worked hard with him for twenty years, and her claim for recognition of the value of her services was no new thing, and was meritorious. They referred to *Forrest v. Laycock* (1871), 18 Gr. 611; *Carr v. Corfield* (1890), 20 O.R. 218; and to the cases and authorities cited in the argument before the Divisional Court, 24 O.R. 591, at p. 602.

*Hogg*, in reply.

November 19. GARROW, J.A.:—Appeal by the plaintiffs from the judgment of a Divisional Court (Falconbridge, C.J., dissenting) reversing the judgment of Mulock, C.J., at the trial, in favour of the plaintiff, setting aside the settlement in question.

The case is fully reported in 24 O.L.R. 591, where the facts sufficiently appear.

As will be seen, Mulock, C.J., was of the opinion that the facts in evidence justified the inference of fraudulent intent; in which view he was strongly supported in the Divisional Court by Falconbridge, C.J. The majority of the Court, however (Britton, J., and Riddell, J.), held otherwise.

There was a consensus of opinion by all the learned Judges that the settlement was voluntary, and that, at least upon paper, the debtor had, when the settlement was made, sufficient other assets to have paid his then debts in full.

An objection urged by the defendants before us is not apparently dealt with in any of the judgments: that is, that, as the plaintiffs' present claim is in respect of a debt arising subsequent to the settlement, and there being no sufficient evidence of an existing prior creditor's claim, the plaintiffs have no standing to attack the settlement; for which proposition *Jenkyn v. Vaughan*, 3 Drew. 419, and the cases following it in our own Courts, were cited.

The evidence shews beyond question that the account of the debtor with the plaintiffs was continuous from a time anterior to

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the settlement until the assignment, although payments were from time to time made sufficient in amount to wipe out the debt actually owing at the date of the settlement. In *Ferguson v. Kenny*, 16 A.R. 276, this circumstance was held by two of the learned Judges (Hagarty, C.J.O., and Osler, J.A.) to be sufficient to maintain the action in respect of a debt subsequently incurred. Maclellan, J.A., based his judgment upon other grounds; and Burton, J.A., while agreeing in the result, withheld his assent to that proposition; so that the point cannot be said to be established by that decision.

It is not, I think, necessary here to express any opinion upon that part of the defendants' contention, farther than to say that the defendants' proposition is not, I think, sufficiently supported by the decisions to which counsel refers, which clearly recognise what is otherwise well established, that a voluntary conveyance made with intent to affect future creditors alone is within the statute and will be set aside.

*Jenkyn v. Vaughan* was referred to and commented upon by Malins, V.-C., in *Crossley v. Elworthy* (1871), L.R. 12 Eq. 158. That learned Judge also subsequently delivered the judgment in the well-known case of *Mackay v. Douglas* (1872), L.R. 14 Eq. 106; approved by the Court of Appeal in *Ex p. Russell*, 19 Ch. D. 588.

*Mackay v. Douglas* was a case of subsequent creditors attacking the settlement where there were no prior unsatisfied claims. The head-note in part says: "A voluntary settlement whereby the settlor takes the bulk of his property out of the reach of his creditors, shortly before engaging in trade of a hazardous character, may be set aside in a suit on behalf of creditors who become such after the settlement, though there are no creditors whose debts arose before the date of the settlement, and though when the settlement was made it was doubtful whether the arrangements under which the settlor was to engage in the business would take effect."

This language seems to me to be exactly applicable to the facts which we have here, and to supply the proper rule by which we should be guided. The debtor here was not merely about to engage in a new business, but had actually been engaged in it for about three months before the settlement was made. He had, it is true, been in the hotel business more than once, some time before, in country places; but he knew nothing about the trade



of the city of Ottawa, which was to him an entirely unknown field of operation. His assets, outside of what was invested in the Ottawa business and of the settled property, were then of little or no account; and much even of the so-called value put into the Ottawa business was intangible, consisting of the price of the license and goodwill, and could not, while the business was being carried on, be made available to pay creditors. Part of the purchase-money even (two thousand dollars) was unpaid, and was secured by promissory notes, to be paid, if at all, out of the profits, if any. The business was carried on largely upon credit for some eighteen months, and then an assignment for the benefit of creditors was made. The property which came to the hands of the assignee was of comparatively trifling amount, going to shew that at the time of, and for some considerable time before, the assignment, the business had been hopelessly insolvent. That such a business was—as was said by Falconbridge, C.J.—a hazardous one, did not require the event to prove. And that the female defendant at least so considered it, is evident by her admitted importunities to obtain the settlement. These were for a time withstood by her husband; but after the three months' experience at Ottawa he yielded.

What had occurred in the meantime to change his mind? Had the three months' experience affected his hopefulness, or shewn him some of the perils which were so soon to overwhelm him? These are questions which I do not find satisfactorily answered in the evidence. I do, however, find that it is stated by a creditor, and not denied by the debtor, that shortly after the date of the settlement—within a very few days in fact—this creditor, alarmed at the amount of the debtor's account, was making inquiries from the debtor about his property, and was then told by the debtor that he still owned the Madoc property; and, in apparent harmony with that idea—that is, that he still owned it—is the undisputed fact that he continued to receive the rents for some time after the settlement. It is true that he says he did so as agent for his wife; but, in the light of all the circumstances, that explanation ought not to be accepted. Then there is the important circumstance that the learned trial Judge, with opportunities which we have not, came to the conclusion that the intent to defeat creditors had been established.

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The question is really one of fact, and much must always depend upon the impression made upon the mind of the trial Judge by the parties when in the witness-box.

In *Fleming v. Edwards*, 23 A.R. 718, cited by counsel for the defendants—a case in its outlines somewhat resembling this—the trial Judge had found against the fraudulent intent: a circumstance apparently not without weight in inducing this Court to reverse the judgment of the Divisional Court and restore that of the trial Judge.

Upon the whole I am, with deference, clearly of the opinion that the judgment of Mulock, C.J., was right, and should be restored.

I would allow the appeal with costs.

MACLAREN and MAGEE, JJ.A., concurred.

MEREDITH, J.A.:—Too much reliance may be laid upon rows of figures, and especially so when it may be that little can be said to be quite certain regarding them, beyond, perhaps, that the additions and subtractions in them are, or are not, correct.

So too rules, based on certain circumstances, as to when a transaction should be, and when it should not be, considered fraudulent, must always give way if they conflict with the very truth regarding the question of intent. In short, the single question in such cases as this always has been, and must always be, whether the transaction impeached was actually made with intent to defeat, hinder, or delay creditors. The means of proving the intent is another thing.

Whether the generous giver of a gift is in debt at the time of making the gift, and if so to what extent, and whether, if so indebted, any of such debts remain unpaid, are, of course, matters of consequence more or less conclusive or weighty in each particular case, but only as evidence of the real purpose of the transaction: and an intention to defeat, hinder, or delay future creditors is within the law affecting transactions in fraud of creditors quite as much as an intention to defeat, hinder, or delay present creditors, though transactions in fraud of future creditors are, of course, less frequent than those in fraud of existing creditors, and more difficult of proof.

But, looking at the main indisputable facts of this case, what other conclusion can fairly be reached than that the conveyance in question was made for the purpose of securing the property comprised in it against the grantor's creditors; to preserve it against the losses he might incur in the hazardous venture upon which he had entered?

Look at the result: in not very much more than a year, possibly in less than a year, after making the gift—for gift it was, as all agree—the man who made it was hopelessly insolvent; there is nothing whatever for creditors; but his wife, and he through her, has the benefit of the property so given, which brings in a rental of \$1,500 a year; and is said to be worth \$15,000, subject to a mortgage for about \$3,250 only.

The man who made this extremely generous provision for his wife, and through her for himself, is a man who had been engaged in business in various ways for many years, quite sufficient to insure that he would, quite as well as most men would, know the possible, as well as the probable, result of any such transaction. He knew that he had entered upon a new and extensive enterprise and one with which he was not familiar; he had long been an inn-keeper in country places, but to become a "saloon-keeper" in the city of Ottawa, and to lay out \$8,000 or more in the venture, was quite a different thing. Whatever he may have thought of the plunge before it was taken, I can have no manner of doubt that when the impeached conveyance was made, several months afterwards, he was very seriously troubled with the question whether he had not made a very serious mistake in which he might soon fare ill. At best it was a risk subject, to so great an extent, to the power of the license commissioners, and to the will of the people regarding liquor license laws and by-laws. His undertaking was a hazardous one, and especially so to one such as he without experience in the city "saloon" business.

It is said that his hopeless financial condition, after his short experience in the venture, was brought about by an order of the license commissioners requiring him to change the position in his house of the bar-room. But I find it impossible to attribute so great a loss to that alone; and, if it could be truly so attributed, it would prove, very conclusively, the very hazardous character of his venture. All he retained, that was of substantial value,

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was the property jeopardised in this venture; that which he conveyed to his wife was the only stable property he possessed, a property bringing in a considerable income, and of considerably greater value really than all the rest. Such a gift may be commendable, but, if so, it surely must be only in the sense in which an unjust steward was commended: he was, substantially, feathering his own, creditors excluded, nest; making provision for the stormy day which soon came down upon him.

I agree with the learned Chief Justice who tried the case in being clearly of opinion that the transaction cannot stand against the plaintiffs, because intentionally made in fraud of creditors, such as they.

Much weight should be attached to the findings of the trial Judge in such a case as this, in which such a Judge has the great advantage of seeing and hearing the witnesses, and in which, having that advantage and all other advantages of a trial Judge, he discredits the defendants in their testimony on the question of the *bona fides* of the transaction. The appeal in the Divisional Court ought not to have been treated as if it were a new trial; nor is the appeal here to be so treated. These things seem to me to have been overlooked by the learned Judges of the Divisional Court who reversed the finding of the trial Judge on the question of the good faith of the transaction; but seem to have been fully borne in mind by the learned Chief Justice who sat with them and dissented from them, with whose views, expressed in that dissent, I am quite in accord.

I would allow the appeal, and restore the judgment directed to be entered by the trial Judge.

*Appeal allowed.*

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[IN THE COURT OF APPEAL.]

RUDD V. CAMERON.

C. A.

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Nov. 19.

*Slander—Defamatory Words Spoken of Plaintiff in Reference to his Trade—Speaking Brought about by Action of Plaintiff—Publication—Privilege—Malice—Jury—Damages—Quantum.*

*Held*, upon the evidence, affirming the judgment of a Divisional Court, 26 O.L.R. 154, that the defamatory words spoken by the defendant of the plaintiff were not invited by the plaintiff with a view to an action against the defendant, though spoken by the defendant to detectives employed by the plaintiff to find out who was slandering him, and induced by false statements made by the detectives; and there was, therefore, publication of the words complained of; the defence of qualified privilege was not available to the defendant because of the actual malice found by the jury; and the damages (\$1,000) were not so excessive as to warrant the granting of a new trial.

*Per* MEREDITH, J.A.:—The plaintiff was not seeking a new defamation of his character with a view to recovering damages; he was seeking knowledge with a view to stopping the secret slanders which he neither desired nor had induced; and so, in this action, was not taking advantage of his own wrong, nor answered by a defence of leave and license. The defendant had, however, a right to stand upon the same ground as if the statements of the plaintiff's detectives had been true; and the words uttered would have been privileged but for the actual malice found.

APPEAL by the defendant from the order of a Divisional Court, 26 O.L.R. 154, dismissing an appeal from the judgment at the trial, upon the verdict of a jury, awarding the plaintiff \$1,000 damages, in an action for defamatory words alleged to have been spoken by the defendant of the plaintiff in the way of his trade.

September 20. The appeal was heard by GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A., and LENNOX, J.

*W. M. Douglas*, K.C., for the defendant. The words spoken which are charged to have been slanderous were induced entirely by the means and contrivance of the plaintiff, who sent detectives to visit the defendant; and they, by worming themselves into the confidence of the defendant, induced him to utter the words charged. There was no publication, as the speaking of the words was brought about deliberately by the plaintiff himself: *King v. Waring* (1803), 5 Esp. 13; *Smith v. Wood* (1813), 3 Camp. 323; *Starkie on Slander and Libel*, 3rd ed., pp. 381, 514; *Howland v. Blake Manufacturing Co.* (1892), 156 Mass. 543; *Sutton v. Smith* (1850), 13 Mo. 120, at p. 124; *Nott v. Stoddard* (1865), 38 Vt. 25, at p. 26; *Gordon v. Spencer* (1829), 2 Blackf. (Ind.) 286; *Irish-American Bank v. Bader* (1894), 59 Minn. 329; *Folkard on Libel*, 7th ed., p. 271. Besides, the occasion on which the words

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were spoken, was privileged. Nor was there sufficient evidence of malice to take away the privilege or to justify the jury in finding a verdict for the plaintiff. In any event, the damages are clearly excessive.

*E. F. B. Johnston*, K.C., for the plaintiff. The judgment of the Divisional Court is right and should be affirmed. The plaintiff, being aware of the fact that he was being grossly slandered, employed detectives to ascertain what was the source of the slanders that were being circulated against him, and it was to these men that the statements proved at the trial were voluntarily made. The words spoken were not at all induced by any means or contrivance of the plaintiff. All that was done was to ask the question, and it was a voluntary act on the part of the defendant himself to make the slanderous statements which he did make, being actuated, as clearly shewn by his own examination for discovery, by the most express malice and hostility towards the defendant. The communication to the detectives was clearly by a publication of the slander: *Duke of Brunswick v. Harmer* (1849), 14 Q.B. 185, which, so far as the question of publication is concerned, overrules *King v. Waring* and *Smith v. Wood*, relied upon by the other side, as is stated in *Odgers*, 3rd ed., p. 191. The occasion upon which the words were spoken was, at the most, one of qualified privilege merely, and there was ample evidence of express malice on the part of the defendant. The damages are not excessive, as the slander was of such a nature as to affect the plaintiff's business very materially.

*Douglas*, in reply.

November 19. MACLAREN, J.A.:—The plaintiff, a merchant and building contractor, was awarded by a jury \$1,000 for damages sustained by him on account of the defendant having slandered him in his business and calling. On appeal to a Divisional Court, the judgment was upheld.

The ground of appeal most strongly urged before us was, that the defendant was entrapped by the plaintiff into using the language he did, and induced to utter the alleged slanderous words by detectives employed by the plaintiff and sent for that purpose; and that, under the circumstances, it was the same as if he had spoken the words to the plaintiff himself and at his request; and

that, consequently, there was no publication of the slander; and that the occasion was privileged. Counsel relied upon *King v. Waring*, 5 Esp. 13, and *Smith v. Wood*, 3 Camp. 323, and upon a number of American cases and authorities which had adopted and followed the rule laid down in England in the above cases.

As to the question of publication, the Divisional Court relied largely upon the case of *Duke of Brunswick v. Harmer*, 14 Q.B. 185, where it was held that the purchase of a single copy of the newspaper containing a libel by the agent of the plaintiff sent for that purpose was sufficient proof of publication. They also refer to the fact that Odgers, 5th ed., pp. 179 and 180, says that, so far as the question of publication is concerned, *King v. Waring* and *Smith v. Wood* must be taken to be overruled by the *Duke of Brunswick* case. It is also pointed out that Sir Frederick Pollock, in his note to *Smith v. Wood*, in 14 R.R. 752, says that the ruling in that case does not seem consistent with *Duke of Brunswick v. Harmer*.

I am of opinion, however, that in this case we do not need to discuss whether the two English cases first-named and the American cases in which they have been followed are or are not good law. The evidence in the present case does not come up to the requirements of these authorities. The detectives were not sent by the plaintiff to the defendant. The evidence is, that the plaintiff, finding that such damaging reports were being circulated in the town, and not knowing who were circulating them, placed the matter in the hands of a detective agency, who sent two of their employees to investigate. They were not told or asked by the plaintiff to go to the defendant. In speaking of the plaintiff to the detectives as he did, the defendant, in my opinion, both in fact and in law, published the slanders he uttered; and he is not in the same position as if he had spoken the words to the plaintiff himself. It may be noted that it has been held that a publication induced by the prosecutor is sufficient in a criminal case: *Regina v. Carlile* (1845), 1 Cox C.C. 229.

I think the defence of privilege also fails. The defendant was under no obligation and owed no duty that justified him in using such language as he did. He did not go into the box and testify that he believed what he said to be true or that he uttered it in good faith. He went far beyond what was suggested to him or

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what he was invited to say by the detective. His own examination for discovery shews that he had no ground for making the statements he did. There is abundant evidence of malice, and this would be sufficient to destroy any such qualified privilege as is claimed, even if it had existed. Further, it would not in any case apply to the slanders voluntarily uttered to the plaintiff's stenographer.

The jury gave a verdict that included a finding of malice, after a charge that was not objected to by the defence either at the trial or in the argument before us. As pointed out to the jury, it was a case in which they might give exemplary damages if they found certain facts. Having found these facts, they exercised their discretion, and I am not aware of any proper ground on which we can declare it to be excessive.

The appeal, in my opinion, should be dismissed.

GARROW, J.A.:—I agree.

MEREDITH, J.A.:—If the plaintiff had by subterfuge induced the defendant to speak defamatory words of him merely for the purpose of having an action for damages, I cannot think that such an action would lie: where one gets no more than he seeks, asks for, and induces, what great right has he to \$1,000 in addition? If one by a trick induces another to arrest or imprison him, can he recover damages in an action complaining of that which his own fraud brought about, and which he designed? The general rule is, that one cannot take advantage of his own wrong; neither can he recover damages for that which had his leave and license. And that which one procures another to do for him may be said, very properly, to be done by himself, in fishing for actions as well as in other things. But that is not this case; it was the case supposed by Lord Alvanley in his ruling in *King v. Waring*, 5 Esp. 13.

It is quite a different thing for one, who has been defamed by a secret enemy, and who, in honest and not unusual or unreasonable endeavours to discover the wrong-doer, is again defamed by one whom he suspected of the secret defamation, to bring such an action as this—even though the new slanders were published only to detectives employed by him and under false statements made by them in such an endeavour. And that is this



case: and was very like the case of *Duke of Brunswick v. Harmer*, 14 Q.B. 185; see also *Griffiths v. Lewis* (1845), 7 Q.B. 61.

The plaintiff was not seeking a new defamation of his character with a view to recovering damages because of it; he was seeking knowledge with a view to putting a stop to the secret slanders which he neither desired nor had induced; and so, in this action, is not taking advantage of his own wrong, or answered by a defence of leave and license.

The action, therefore, lies; but the defendant has, I think, a right to stand upon the same ground as if the statements of the plaintiff's detectives had been true; another instance of the rule against any one taking advantage of his own wrong; and, that being so, the words uttered would have been privileged but for the actual malice of the defendant found by the jury, on evidence upon which reasonable men could so find.

This was the view of the case taken, and acted upon, by the trial Judge; and confirmed in the Divisional Court.

And, having regard to all the facts and circumstances of the case, it cannot be considered that the damages are so great as to warrant the granting of a new trial on that ground.

MAGEE, J.A., and LENNOX, J., agreed in the result.

*Appeal dismissed with costs.*

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## [IN THE COURT OF APPEAL.]

## FLEMING v. TORONTO R.W. Co.

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Nov. 19.

*Negligence—Street Railway—Injury to Passenger—Electric Explosion—Evidence—Onus—Defective Condition of Controller—Inspection—Findings of Jury—Nonsuit—Judgment on Former Appeal.*

Upon the second trial of this action, directed by the Court of Appeal, 25 O.L.R. 317, the jury found that the plaintiff's injuries were caused by the negligence of the defendants, such negligence consisting in using (upon their electric street-car in which the plaintiff was a passenger when injured) a rebuilt controller in a defective condition, and not properly inspected; that the motorman was guilty of negligence in not applying the brake when the electric explosion referred to in the evidence occurred; and that there was no contributory negligence:—

*Held*, that there was sufficient evidence proper for the jury upon which they might reasonably find as they did.

*Per* GARROW, J.A.:—The accident was an unusual one—one that could not have happened if the controller had been in proper condition. It was under the care and management of the defendants' servants. It had at one time, not long before the accident, become so worn out that it had to be rebuilt; and the onus, in the circumstances, was upon the defendants to shew that that had been properly done—an onus not discharged by the evidence which was given. And the evidence did not shew satisfactorily that such an inspection had recently been had as would probably have discovered the defects, if there were any.

*Scott v. London and St. Katherine Docks Co.* (1865), 3 H. & C. 596, 601, specially referred to.

*Per* MEREDITH, J.A.:—The defendants were not entitled to a nonsuit on the first ground upon which the action was based; that was settled adversely to the defendants, so far as the Court of Appeal was concerned, by the judgment in the former appeal. Upon the other branch of the case, there was evidence upon which reasonable men might find, as the jury did find, that the accident was caused by a defect in the controller which proper inspection would have discovered in time to have prevented the accident.

APPEAL by the defendants from the judgment of MEREDITH, C.J.C.P., upon the findings of a jury, in favour of the plaintiff, at the second trial of the action.

The plaintiff was a passenger upon an electric street-car of the defendants, when an electric explosion occurred in the car, and the plaintiff was injured by being forced out of the car and thrown upon the ground by his panic-stricken fellow-passengers. He charged the defendants with negligence. At the first trial, before MIDDLETON, J., and a jury, the jury found negligence, and judgment was entered for the plaintiff for \$1,200. This judgment was set aside by the Court of Appeal and a new trial ordered: 25 O.L.R. 317.

At the second trial, the jury again made findings in favour of the plaintiff, and judgment was given for him thereon, from which the defendants appealed.

September 23. The appeal was heard by GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

*D. L. McCarthy*, K.C., for the defendants. The learned Chief Justice who tried the case should have directed the jury that there was no evidence that the controller used on the car was a rebuilt one, and in a defective condition, or that it had not been properly inspected. A carrier is not an insurer of the people carried, and is not liable for the consequences of such an accident as the one in question. The appellants shew that they had a proper controller, properly inspected, and against this there are merely the theories of experts. As to the finding of the jury that the motorman was guilty of negligence in not applying his brake, it is submitted that he was called upon to act in an emergency, and acted with great coolness and judgment under the circumstances. He was not bound to exercise the very best possible judgment; and, even if stopping the car would have prevented the accident, which is not shewn by the evidence, it cannot be said that he was guilty of negligence. Reference was made to *Flannery v. Waterford and Limerick R.W. Co.* (1877), I.R. 11 C.L. 30; *Holmes v. Mather* (1875), L.R. 10 Ex. 261.

*H. D. Gamble*, K.C., for the plaintiff. The findings of the jury on which judgment has been given in his favour are neither perverse nor unreasonable. Correct construction and constant inspection of electric appliances are necessary, and the defendants had within their power and knowledge ample means to secure the safety of passengers so far as it depended upon such matters. There was ample evidence to support the findings of the jury upon these points, and they should not be disturbed. It is shewn by the evidence that the controller was what is known as a rebuilt controller, and was in a defective condition; that the accident was caused by a short circuit in the controller due to its defective condition; and that it had not been properly inspected. There is also ample evidence to support the finding of the jury that the motorman was negligent in failing to apply the brake and stop the car. Reference was made to *Richard Evans & Co. Limited v. Astley*, [1911] A.C. 674, 678; *Griffith v. Grand Trunk R.W. Co.* (1911), 2 O.W.N. 1059; Beven on Negligence, 2nd ed., vol. 1, p. 143, where the decision of Palles, C.B., in the *Flannery* case is discussed; the *Flannery* case, cited by the appellants, at p. 38,

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where *Scott v. London and St. Katherine Docks Co.* (1865), 3 H. & C. 596, at p. 601, is referred to; *Shawinigan Carbide Co. v. Doucet* (1909), 42 S.C.R. 281, 300; *Cox v. English Scottish and Australian Bank*, [1905] A.C. 168, 170; *Jones v. Spencer* (1897), 77 L.T.R. 536, per Halsbury, L.C., at p. 537; *Farrell v. Limerick Corporation* (1911), 45 Ir. L.T. 169; Amer. & Eng. Railroad Cases, N.S., vol. 59, p. 443.

*McCarthy*, in reply.

November 19. GARROW, J.A.:—Appeal by the defendants from the judgment at the trial before Meredith, C.J., and a jury, in favour of the plaintiff.

The action was brought by the plaintiff to recover damages said to have been caused to him while a passenger upon the defendants' railway owing to the defendants' alleged negligence.

The case has been twice tried, resulting each time in a judgment in favour of the plaintiff.

The jury, in answer to questions, found that the plaintiff's injuries were caused by the negligence of the defendants, such negligence consisting in using a rebuilt controller in a defective condition, and not properly inspected; the motorman was guilty of negligence in not applying the brake, which would have prevented the accident; and there was no contributory negligence.

The only question which we are called upon to determine upon this appeal is, was there sufficient evidence proper for the jury upon which they might reasonably find as they did? And, in my opinion, there was, except perhaps as to the motorman's negligence, and particularly as to its bearing upon the result. The latter, especially, I, upon the evidence, greatly doubt; so much so that, if the case depended upon that finding alone, I could not approve. But, as the earlier findings are in themselves, if sustained, sufficient, I do not further discuss that aspect of the case.

The full and careful charge of the learned Chief Justice was not objected to.

In opening his address the learned Chief Justice said: "The main facts are simple. Any difficulties there are in the case arise from the view you take of the somewhat conflicting evidence by expert witnesses, and how far you give credit to the testimony generally of the witnesses who have been called."



This extract seems to furnish not only the keynote of the charge but of the case itself. It is not in dispute that something unusual occurred on the occasion in question, the outward manifestation of which was a loud explosion, followed by flame and smoke, and by panic on the part of the passengers, in the course of which the plaintiff fell or was forced out of the car, and received severe injuries.

Nor is it, I think, in serious dispute that the seat of the defect was in the controller, resulting in the formation of a short circuit. Both Mr. McCrae and Mr. Richmond seem to agree upon that, the former saying, "In my opinion, if you take the area of the controller—confined in the controller, is the area in which the accident occurred;" and the latter, that the controller must have been in a defective condition or the accident would not have happened. The latter, it is true, also criticised the original construction of the controller. But he admitted that it was of standard make, and of a type in general use, and was quite unable to point to a case in which his ideas had been carried out. So that, if the controller had been otherwise perfect, this criticism would, I think, have been harmless.

But the controller was not as originally built, but had been "overhauled" by the defendants, which is explained as, taking it apart and putting in new parts in the place of parts which had become worn.

The circumstances seem to me to bring the case within the principle often acted upon, laid down in *Scott v. London and St. Katherine Docks Co.*, 3 H. & C. 596, at p. 601, that "where the thing is shewn to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care." There is, as I have pointed out, practical agreement in the evidence of the experts that the accident was a very unusual one, and one that could not have happened if the controller had been in proper condition. It was certainly under the care and management of the defendants' servants. It had at one time, not long before the accident, become so worn out that it had to be rebuilt; and the onus, under the circumstances, was, I think,

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upon the defendants to shew that that had been properly done—an onus not, in my opinion, discharged by the evidence which was given.

Then as to the inspection—inspection from time to time of the controller is admittedly necessary, and inspection of a kind was, upon the evidence, probably had not long before the accident. But it, too, as in the case of the evidence as to the rebuilding of the controller, was of an unsatisfactory general nature, quite insufficient to convince that such an inspection had recently been had as would probably have discovered the defects, if there were any.

Under these circumstances, it seems to me that both questions were properly for the jury, and that the appeal should be dismissed with costs.

MACLAREN and MAGEE, JJ.A., concurred.

MEREDITH, J.A.:—If the defendants were entitled to a nonsuit on the first ground upon which this action is based, they ought to have had it at the first trial; or upon the appeal to this Court against the ruling refusing a nonsuit at that trial: I cannot, therefore, look upon this question otherwise than as settled adversely to the defendants, so far as this Court is concerned, by its judgment in the former appeal. It cannot be said that the case in this respect was less favourable to the plaintiff, on the whole evidence, at the later than at the earlier trial.

There was, too, I think, evidence to go to the jury upon the other branch of the case: evidence upon which reasonable men might find, as the jury in this case did find, that the accident was caused by a defect in the controller which proper inspection would have discovered in time to have prevented the accident.

The other questions were also all questions for the jury, and have now been twice found adversely to the defendants.

*Appeal dismissed with costs.*

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## [IN THE COURT OF APPEAL.]

## REX V. PILGAR.

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Nov. 19.

*Criminal Law—Procedure at Trial—Jurors—Interest or Bias—Right of Defendant to Challenge for Cause—Time for Challenge—Refusal of Right—Error or Misunderstanding—Jurisdiction of Court of Appeal—Stated Case.*

At the opening of the trial of the defendant for arson, before a County Court Judge and a jury, the defendant's counsel said to the Judge that, before the jurors were called, he would like to ask each of them whether they were interested in a certain mutual fire insurance company, saying that, if any were, they would not be eligible. The Judge answered, "We will see when the question arises." The jurors were then called, and the defendant's counsel challenged five peremptorily, but none for cause. The jury was empanelled and sworn; and the defendant's counsel then asked the Judge "to see if any of the jury are interested" in the company; but the Judge said that it was too late to challenge for cause, and, the trial proceeding, the defendant was found "guilty:"—

*Held* (MEREDITH, J.A., dissenting), upon a case stated by the Judge, that the defendant had not been refused the right to challenge for cause; that the first application of the defendant's counsel was premature, and the second was too late; and that the Court had no authority or jurisdiction to intervene in a case of error or misunderstanding.

*Per* MEREDITH, J.A.:—What took place deprived the prisoner of the right of challenge for cause; what the Judge said was the cause of that deprivation; and so what took place amounted to a substantial refusal of the right of challenge for cause.

CROWN case reserved.

The following statement of the facts is taken from the judgment of MACLAREN, J.A.:—

The accused was tried for arson at the Halton Sessions before the County Court Judge and a jury, and found "guilty."

The Judge reserved two questions for this Court. The facts are set forth in the stated case by His Honour as follows:—

"At the opening of the trial, and after the defendant had pleaded 'not guilty,' the following conversation took place between counsel for the defendant and myself:—

"Mr. Cameron: Before they call the jury, I would like to ask each of the men who are called whether they are interested in the Halton Mutual Fire Insurance Company. If any of them are interested in that company, I submit they would not be eligible to sit on this jury.

"His Honour: We will see when the question arises.

"Mr. Cameron: Of course, I cannot tell without asking them.

"The clerk of the Court then proceeded with the calling of the jurors. At my request, the clerk asked to stand aside several

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of the jurymen who had served on a jury the previous day, and counsel for the defendant challenged some five jurors peremptorily. The jury was empanelled and sworn. The following conversation then took place between counsel for the defendant and myself:—

“Mr. Cameron: Would your Honour see if any of the jury are interested in the Halton Mutual Fire Insurance Company?”

“His Honour: It is too late, Mr. Cameron; I was waiting for it; that would be a good challenge for cause.

“Exhibit 8 shews that the Halton Mutual Fire Insurance Company was actively engaged in prosecuting the fire inquest in connection with the burning of buildings, for the burning of which the charge of arson was laid herein, and the affidavit of John Wilson Elliott shews that some of the jurymen who tried the defendant were interested in the Halton Mutual Fire Insurance Company.

“I have reserved for the opinion of this honourable Court the following questions:—

“1. Was the request of the defendant’s counsel to examine the men called to serve on the jury which was to try the defendant made at the proper time, and at the time when the question of their interest in the Halton Mutual Fire Insurance Company arose?

“2. Did what took place between counsel for the defendant and myself, and prior to the empanelling of the jury which tried the defendant, amount to a refusal of the defendant’s right of challenge for cause?”

September 27. The case was heard by GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A., and LENNOX, J.

*D. O. Cameron*, for the prisoner. When acting as counsel at the trial, I was put off my guard, and, as a consequence, the accused was debarred of his right to challenge for cause, by the action of the learned trial Judge. No man should sit as a juror in a case in which his private interests are concerned. The result of the Judge’s action was, that men who were interested in the result of the trial sat on the jury, but the accused had no opportunity of shewing that such was the case.

*J. R. Cartwright*, K.C., for the Crown, argued that the strict rule should be followed in such cases, and that it was too late to



challenge for cause when the book was in the juror's hand. He referred to *Regina v. Giorgetti* (1865), 4 F. & F. 546, at p. 553, where Joy on Confessions, p. 217, is cited. See also Archbold's Criminal Pleading, 24th ed., pp. 207, 213.

*Cameron*, in reply, referred to *Regina v. Coulter* (1863), 13 C.P. 299; *Rex v. Barsalon* (1901), 4 Can. Crim. Cas. 343, 345; *Whelan v. The Queen* (1868), 28 U.C.R. 2, at p. 51. What the trial Judge said was virtually a refusal of the right to challenge.

November 19. MACLAREN, J.A. (after setting out the facts as above):— There is no suggestion that the usual caution was not given to the accused by the clerk of the Court, before the jurors were sworn, in the prescribed formula: "Prisoner, these good men whose names you shall now hear called are the jurors who are to pass between our Sovereign Lord the King and you upon your trial; if, therefore, you would challenge them or any of them, you must challenge them as they come to the book to be sworn, and before they are sworn, and you shall be heard." See Archbold, 24th ed., p. 207: Taschereau, p. 779.

His counsel had no right to interrogate or ask any juror any question without challenging him for cause: Archbold, p. 213. The first application, if application it can be called, was premature, as it was made before the jury were called. The second was too late, as it was made only after the jury were sworn, when the Judge had no power to grant it.

The first question must, therefore, be answered in the negative.

As to the second question, I do not see how it can be said that what took place between the Judge and counsel, before the empanelling of the jury, can be said to amount to a refusal of the defendant's right to challenge for cause. It was a statement that the point would be dealt with when it arose, the Judge apparently being under the impression that counsel would challenge for cause any juror whom he suspected of being a member of the mutual insurance company mentioned. It would appear that counsel misunderstood his Honour's expression, "We will see when the question arises," and interpreted the use of the "we" as an intimation that his Honour would do the questioning. As counsel did not challenge any juror at the proper time, it may be

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that the Judge thought that he knew that none of the twelve who were sworn were members of the mutual insurance company mentioned. As I have said, I do not think it can be construed into a refusal of the right to challenge for cause; and, in my opinion, the second question must also be answered in the negative.

By sec. 1014 of the Criminal Code, it is provided that it is only questions of law that can be reserved for this Court in a stated case, and we must answer them strictly as we understand the law to be. We have no authority or jurisdiction to intervene in a case of error or misunderstanding. Section 1022 of the Code indicates where application for relief should be made in such cases, namely, to the Minister of Justice.

LENNOX, J.:—The answers to both questions reserved should be "No." But at the same time I desire to add, with the greatest respect, that, in my opinion, it would have been much more satisfactory if the learned County Court Judge, knowing of the desire and intention of the prisoner's counsel, had, when the proper time for challenge was reached, then called counsel's attention to the matter, and afforded him an opportunity of exercising his undoubted right. I am sure the learned trial Judge will agree with me that, whatever may be the actual presumption as to the prisoner's guilt or innocence, and whether he is defended with skill and judgment or the reverse, it is always the duty of the presiding Judge to see to it that nothing shall prevent the prisoner from having a fair trial and British justice.

GARROW and MAGEE, JJ.A., concurred.

MEREDITH, J.A. (dissenting):—The formal questions submitted for the opinion of this Court must be read in connection with the rest of the stated case, and must be given a reasonable interpretation with a view to meeting the real points of the case; and a strictly literal interpretation, which would answer no useful purpose, ought not to be applied to them if they are fairly open to an interpretation which would meet the real needs of the case.

To interpret the questions in this case as meaning: is it regular to object to a juryman, for cause, before he is called? and did the Judge refuse to entertain an objection at the time when the objection ought to have been made? would be to consider the reservation of this case a futile proceeding and a mere waste of time; which I am quite sure no one could have meant.

That which the Judge must have desired to know was, whether he had by his conduct in any way deprived the prisoner of the opportunity to prevent persons disqualified by interest trying him upon the very grave charge made against him, and of which the jury found him "guilty;" if, therefore, the questions are capable of an interpretation which will enable this Court to consider such real point, and enable it to do justice in the case, they ought to be so understood and acted upon.

It is quite clear that counsel for the prisoner was not familiar with the practice in criminal cases; but he plainly intimated, at the outset, that he desired to guard against any one disqualified by interest acting as a jurymen; and, in the accomplishment of that desire, it ought to be needless to say, he ought to have had every reasonable assistance that the Court could give.

Then what happened? At the very outset the Judge was made aware of a possibility of some of the jurymen being disqualified by personal interest; and, upon being made aware of that fact, said, "We will see when the question arises." Not, "You are premature, you must raise the question at the proper time." If he had said that, he would probably have been asked to say when the proper time would be; and counsel would have raised the question again at the proper time. It would not be unreasonable for the prisoner, or for his counsel, to rest assured, after the Judge had said, "We will see when the question arises," that the Court would see at the proper time that opportunity for inquiry as to disqualification of jurors was afforded. Having regard to the duty of the Court to take great care that the prisoner got a fair trial, what else could the Judge's answer to counsel, obviously unfamiliar with the practice in this respect, mean? When the proper time came "we"—whether "we" meant the Court, or the Judge and counsel—did not "see" to it; and, consequently, the man was deprived of his right of objection to any juror for cause, and so may have been tried by jurors disqualified by personal interest.

What took place obviously deprived the prisoner of the right of challenge for cause; and that which the Judge said was plainly the cause of that deprivation; and so I think it may be said, fairly, that that which took place did amount to a substantial refusal of the right of challenge for cause. Counsel is not to be substituted for prisoner; neither the point, nor the question, is: was counsel

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refused? The point and the question are: Did all that took place amount to a refusal of intended challenge? No one would call it incorrect to say that it amounted to a denial of the right; and surely that is equivalent to a refusal in the sense in which this case is stated for our opinion.

I cannot but think and say that it was plainly the duty of the Court, under all the circumstances, to have taken great care that a jury of disinterested jurors only was empanelled: to wait until it was too late to object, before saying anything, may very well have misled the prisoner out of his right, and was, in my opinion, an error on the part of the Court, as well as of counsel.

I answer the first question: No; it is not a question which should have been reserved, for it is one about which there could be no reasonable doubt.

And my answer to the second question is: Yes, substantially.

And, accordingly, I would direct a new trial.

*Conviction affirmed; MEREDITH, J.A., dissenting.*

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[IN THE COURT OF APPEAL.]

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*Limitation of Actions—Recovery of Land—Possession—Evidence of Tenancy—Limitations Act—Mortgage—Registered Discharge—New Starting-point—Registry Act.*

The decision of a Divisional Court, 25 O.L.R. 379, was reversed, and the judgment of MULLOCK, C.J.Ex.D., *ib.*, was restored; MEREDITH, J.A., dissenting.

*Held, per Curiam*, that the occupancy of the defendant's husband began as a tenancy at will, which was never afterwards interrupted or changed, and that at the end of ten years from the end of the first year of the tenancy the statutory bar against the plaintiff was complete.

*Held*, also (MEREDITH, J.A., dissenting), that the discharge of the mortgage and its registration did not enure to the benefit of the plaintiff so as to give a new right of entry or starting-point under the statute.

Review of the authorities and consideration of the provisions of the Registry Act and the Limitations Act.

*Brown v. McLean* (1889), 18 O.R. 533, 535, approved.

*Per GARROW, J.A.*:—When the plaintiff obtained the discharge, he was a stranger to the estate, and had, therefore, no estate or interest to be enlarged by paying off the mortgage and obtaining a statutory discharge.

*Per MEREDITH, J.A.*:—The defendant, by length of possession of her husband, had ousted the plaintiff from and had acquired for her husband's heirs the equity of redemption of the land; the plaintiff had acquired, under the mortgage, in his own name, with his own money, and for his own benefit, the legal estate in the land, at the least; and so the defendant was entitled, at most, only to redeem the land from him; and, consequently, the plaintiff was entitled to possession, which was all that he sought in the action.



APPEAL by the defendant from the judgment of a Divisional Court, 25 O.L.R. 379, reversing the judgment of MULOCK, C.J. Ex.D., and declaring the plaintiff entitled to recover possession of lands in the city of Brantford, notwithstanding the defence of the Statute of Limitations.

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April 24. The appeal was heard by MOSS, C.J.O.,\* GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.

*M. K. Cowan*, K.C., for the defendant. The son on the 1st April, 1895, became a tenant at will of the plaintiff: *Keffer v. Keffer* (1877), 27 C.P. 257. This tenancy at will was never interrupted or changed, and on the 1st April, 1906, the plaintiff became completely barred. The fact that the plaintiff had made payments on the mortgage did not prevent the Statute of Limitations running against him: *Fisher v. Spohn* (1883), 4 C.L.T. 446; *Brown v. McLean* (1889), 18 O.R. 533. The being assessed as owner or the payment of taxes would not make the plaintiff the owner: *Lynes v. Snaith*, [1899] 1 Q.B. 486. The registration of the discharge of mortgage did not give any new right of entry or starting-point under the statute.

*W. S. Brewster*, K.C., for the plaintiff. The statutory bar was never complete against the plaintiff. There was ample evidence from which a new tenancy at will could be implied from the acts and conduct of the parties. During the whole time of the son's occupation, the property was assessed to the father as freeholder, and to the son as tenant, and the taxes had always been paid by the father, and this had been acquiesced in by the son: *Foster v. Emerson* (1854), 5 Gr. 135; *Turner v. Doe d. Bennett* (1842), 9 M. & W. 643. The registration of the discharge of mortgage created a new starting-point for the statute, and reconveyed to the plaintiff his original title in fee, with the right to possession as from the date of repayment: *Lawlor v. Lawlor* (1882), 10 S.C.R. 194; *Henderson v. Henderson* (1896), 23 A.R. 577; *Ludbrook v. Ludbrook*, [1901] 2 K.B. 96. The plaintiff, in any event, having paid off the mortgage, is entitled to be subrogated to the rights of the mortgagee, even though the

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discharge has been executed and registered: *Brown v. McLean*, 18 O.R. 533; *Abell v. Morrison* (1890), 19 O.R. 669.

*Cowan*, in reply.

November 19. GARROW, J.A.:—Appeal by the defendant from the judgment of a Divisional Court reversing the judgment at the trial of Mulock, C.J.

The action was brought to recover possession of land in the city of Brantford. The defence was the Statute of Limitations. The case is reported in 25 O.L.R. 379.

The case naturally divides into two branches: the first, as to the nature and terms of the occupancy of the land by the defendant and her late husband; and the second, as to the legal effect of the registered discharge of mortgage.

Upon the first branch, Mulock, C.J., held that the occupancy began as a tenancy at will, which was never afterwards interrupted or changed, and that at the end of ten years from the end of the first year of the tenancy the statutory bar against the plaintiff was complete. And, upon the second branch, that the discharge of mortgage and its registration did not have the effect contended for of giving a new right of entry or starting-point under the statute.

I agree with Mulock, C.J., upon both branches.

As to the first, in so far as it depends upon facts concerning which there was conflicting evidence, the finding of the trial Judge should not, upon general principles, have been disturbed.

But, apart from that, I am, with deference, quite unable to see in the evidence as a whole any circumstance which would justify the inference drawn by the Divisional Court that the tenancy at will originally existing was ever put an end to, or a new tenancy of any kind created: see, in addition to the cases referred to by the learned Chancellor, *McCowan v. Armstrong* (1902), 3 O.L.R. 100.

The second branch seems to depend largely upon the proper construction of the Registry Act, now 10 Edw. VII. ch. 60, sec. 66a, as added by 1 Geo. V. ch. 17, sec. 31, which provides that a certificate of discharge shall, when registered, be (1) a discharge of the mortgage, (2) as valid and effectual in law as a

release, and (3) as a conveyance to the mortgagor, his heirs or assigns, of the original estate of the mortgagor.

The plain object intended to be attained is merely by a short and simple form to discharge from the title the incumbrance created by the mortgage, which, in equity at least, was never considered as more or other than a charge, the beneficial ownership remaining in the mortgagor.

The section does not say that the certificate is a release or is a conveyance, but that it shall—of course for the purpose intended—have the effect of a release and a conveyance. Such being the clear purpose, it seems to me that the proper construction is that placed upon similar language by Street, J., in *Brown v. McLean*, 18 O.R. 533, at p. 535, as “merely replacing the mortgagee’s estate in the person best entitled to it, without allowing it to affect the real rights of any person.”

Nor can it make any difference in the proper construction that the question arises in such a case as this, where the estate to be benefited is one acquired under the Limitations Act. At the time of the registration of the discharge, the plaintiff’s title had, under the provisions of sec. 16 of that Act, now 10 Edw. VII. ch. 34, if I am right as to the first branch, been extinguished for over four years, during which the defendant and those claiming under her late husband had been the statutory owners of the equity of redemption. Statutes of limitation have been called beneficial statutes, inasmuch as they are “Acts of peace,” and the rule of strict construction does not apply to them. That does not, of course, mean that the Court should assist an imperfect title set up under the statute, or overlook fraud or dishonesty where they are elements in the statutory title attempted to be made out. Nothing of the kind, however, appears in this case; for I find it impossible to doubt, upon the whole circumstances appearing in evidence, that what the plaintiff now desires to do is to recall, for a reason not avowed, an apparently not unreasonable bounty intended by him for the benefit of his son, now dead. This does not, of course, prevent him from standing upon his legal rights, if any; but, on the other hand, the statutory title, if any, acquired by the defendant is not the proper subject

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of prejudice because it was so acquired, but should stand upon the same footing as any other title recognised by the law.

In so far as "land" is concerned (interpreted in sec. 2 (c)), the whole estate is *primâ facie* affected by an opposing possession—exceptions, however, being made in favour of future estates, disabilities, mortgagees, concealed fraud, etc. But none of the exceptions can, as I read them, be made reasonably to include such a case as this, where the plaintiff's estate had been absolutely extinguished. How it would be if the plaintiff had obtained the discharge before the expiry of the ten years need not now be determined. That was the situation in *Henderson v. Henderson*, 23 A.R. 577, in which the question was considered by Maclellan, J.A., who arrived at the conclusion that the registration of the certificate of discharge gave a new starting-point or right of entry. Burton, J.A., agreed; but the other members of the Court, Hagarty, C.J.O., and Osler, J.A., declined to express an opinion upon the point, which, in the view they took of the facts, was not necessary.

In the following year, a somewhat similar point was considered in the English Court of Appeal, in *Thornton v. France*, [1897] 2 Q.B. 143, in which the authority of *Doe d. Baddeley v. Massey* (1851), 17 Q.B. 373, the case upon which Maclellan, J.A., mainly relied, was somewhat shaken, and was certainly not followed, but distinguished. In *Doe d. Baddeley v. Massey* it is said (p. 382) that the construction there maintained was necessary for the protection of mortgagees. And, if the fact is as stated by Chitty, L.J., in *Thornton v. France*, at p. 157, that the mortgagee in *Doe d. Baddeley v. Massey* joined in the conveyance, with the mortgagor, for the purpose of recovering the money due on the mortgage, and of conveying the legal estate to the purchaser, the conclusion that the purchaser was, under the circumstances, a person claiming under the mortgage, as well as the mortgagor, was not perhaps unreasonable. In *Thornton v. France*, the mortgage, it is worth noting, was after what I may call the adverse possession had commenced, and it was held that time was running against both mortgagor and mortgagee; in other words, that the giving of the mortgage, under such circumstances, did not affect the operation of the statute.



Other illustrative instances in which the purchasers were held entitled to claim under the mortgagee, are: *Heath v. Pugh* (1881), 6 Q.B.D. 345, in which the whole subject is very fully considered in the Court of Appeal by Lord Selborne, L.C., afterwards affirmed in the House of Lords: *Pugh v. Heath* (1882), 7 App. Cas. 235; *Ludbrook v. Ludbrook*, [1901] 2 K.B. 96; and, in our own Courts, *Cameron v. Walker* (1890), 19 O.R. 212. In *Ludbrook v. Ludbrook*, differing in this respect from *Thornton v. France*, the mortgage had been executed before the possession began, which I assume was the position here, although the point is perhaps not very clear. But in that case the plaintiff had not only acquired the reversion, but had purchased and kept on foot the mortgages (see p. 99); and it was, accordingly, held that, under the circumstances, he was justified in taking possession in his capacity of mortgagee.

But all these cases differ widely from the present. When the plaintiff here obtained the discharge, he was a stranger to the estate, and had, therefore, no estate or interest to be enlarged by paying off the mortgage and obtaining a statutory discharge. He might, of course, as in *Ludbrook v. Ludbrook*, have taken an assignment of the mortgage, for he was under no obligation to the defendant to pay it, and in that way have fully protected himself to the extent of the payment. He may even yet, upon the principle applied in *Brown v. McLean*, be able in another action to establish a lien to the extent of the payment. With that, however, we have here nothing to do; for, although leave was sought at the trial to set up such a claim, the application was, quite properly at that stage, disallowed.

Upon the whole, I am of the opinion that the appeal should be allowed with costs and the judgment at the trial restored.

MACLAREN, J.A.:—I agree.

MAGEE, J.A.:—The plaintiff claims possession of a house and lot in Brantford occupied by the defendant and her infant daughter, the only child of Frank Noble, her deceased husband, son of the plaintiff.

It is not disputed that the plaintiff purchased the property for \$900; and it was conveyed to him by deed dated the 20th

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February, 1895. On the same day, he mortgaged it to the Royal Loan and Savings Company for \$650, repayable \$50 annually for four years and the balance in five years with interest yearly. The son was let into possession on the 1st April, 1895, and continued to reside there with his wife until, in April, 1907, he was removed to an Asylum for the Insane, where he remained "just a year," until his death on the 24th April, 1908. The defendant had stayed in the house with her child during his absence, and has since his death occupied it except during about four months in 1908, when it was rented to one Smith, who paid the rent to her. The plaintiff paid instalments of \$50 of principal on the mortgage in March, 1896, 1898, and 1899, and continued to pay the interest each year until the 29th February, 1908, when he paid the \$500 balance of principal. He then obtained from the mortgagees a discharge of the mortgage in statutory form, certifying that he had "satisfied all moneys owing" upon it, and that it was "therefore discharged." The discharge was registered on the 11th January, 1911, before this action.

The other material facts are sufficiently set forth in the judgments at the trial and in the Divisional Court. There are some misapprehensions of fact in the latter as to uniform payment of taxes by the plaintiff and proof of mode of assessment and supply of material for all repairs, and as to the son working the whole time for the plaintiff; but these are not, in my view, material. What are called the father's "frequent visits to the place," he himself only describes as "calling to see my son and his family." As to the father leasing the place with the defendant's assent, it may be noted that the learned Chief Justice at the trial considered that he did so as the defendant's agent.

Two questions arise: first, was the plaintiff's title as owner of the equity of redemption extinguished during Frank Noble's lifetime, under sub-sec. 7 of sec. 5 and secs. 4 and 15 of R.S.O. 1897, ch. 133, the Real Property Limitation Act? and, second, did the registration of the discharge of mortgage confer upon the plaintiff a fresh right to possession? On both questions the Divisional Court reversed, in the plaintiff's favour, the judgment at the trial.

On the first question the judgment appealed from proceeds upon grounds thus stated by the learned Chancellor, who delivered the judgment of the Court: "The legal effect of the Statute of Limitations, when one is let into possession of land as in this case, is, that he becomes a tenant at will, and the right of entry to the owner accrues at the expiration of one year thereafter. The continuation of the possession is regarded as a tenancy at sufferance, unless evidence be given that a fresh tenancy has been created. A new tenancy at will is to be implied from acts and conduct of the parties which ought to satisfy a jury (or the Court) that there is such an agreement. . . . In the present case, during the whole period . . . the lot has been assessed to the plaintiff as freeholder and to the son as tenant, and the taxes have been uniformly paid by the father. This appears to me to present an act *in pais* respecting the property, which manifests the very truth that the father was from year to year recognised as the owner and the son as occupier or tenant; and this with the express assent and acceptance of the son. . . . To give effect to the statute would be to frustrate the clear intention of the owner to hold it in his own hands as the proprietor." And the judgment refers to the leasing of the place by the father to Smith with the defendant's assent as being "inconsistent with her husband being the owner, and reflects light on the real nature of the son's occupation."

With much respect, I venture to think that the case is here treated by the Divisional Court as if the Statute of Limitations actually determined the tenancy at will in one year, and thus rendered the creation of a fresh tenancy at will possible and for the plaintiff necessary. Therein, as I think, lies the whole question; for, if the statute did not determine it, there is not a suggestion of any other act of the parties or fact which would operate as a determination or indicate that the original tenancy at will was ever put an end to before the 1st April, 1906, or thereafter if it continued to be a tenancy at will until the son's death. The plaintiff does not suggest that anything was ever said between him and his son on the subject, and no entry or change of title or act inconsistent with continuance is shewn.

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The father's calls to see his son and his family certainly could not bear that construction.

The statute, of course, has no such effect as to terminate the tenancy at the end of the first year, and the Divisional Court did not say that it had, but that Court did proceed to infer that the parties had in fact acted as if such was its effect, and had from year to year created a fresh tenancy as often as the statute ended the previous one, and in effect thus made eleven successive tenancies in theory, where there was only one in fact. The statute, however, contemplates that a tenancy at will created eleven years before action may have continued the whole time, and yet, if the landlord has neither received rent nor obtained a written acknowledgment, his rights will be barred. If there has been a determination in fact of the tenancy, that does not stop the statute running if the tenant continues in possession, but it leaves it open to the jury or Court to find that, after such determination, a new tenancy at will was in fact created by the parties, and so a new starting-point gained by the landlord. But this fresh tenancy presupposes the ending of the previous one in some way; and, if that has not been ended, there is no new one. True, the acceptance of a new tenancy might, in a proper state of facts, imply the surrender of the old one, but that would require very clear evidence, of which there is here an entire absence.

Indeed, the Privy Council in *Day v. Day* (1871), L.R. 3 P.C. 751, at p. 763, said: "The language and policy of the statute require that to constitute this new *terminus â quo*, the agreement for a new tenancy should be made by the parties with a knowledge of the determination of the former tenancy, and with an intention to create a fresh tenancy at will;" a pronouncement which Channell, J., hesitates to accept in *Jarman v. Hale*, [1899] 1 Q.B. 994, in which case, however, there was an actual determination.

The judgment of the Divisional Court on this point is based upon the case of *Foster v. Emerson*, 5 Gr. 135, where the Court did go the length of holding that, if the occupancy was shewn to be within the then period of twenty years that of tenant at will, the statute would not take effect, and this apparently



whether the occupancy was under a continuing tenancy twenty-one years old, or under a fresh tenancy within twenty-one years. It is questionable if such a conclusion was necessary in that case. Although Spragge, V.-C., said that no question arose upon actual or presumed determination, yet Esten, V.-C., said (p. 152) that "with regard to Joseph Canniff, the tenancy seems to have been determined by the entry of the testator in 1837;" and there appear to have been various acts of the parties which the Court might well have construed as determining the tenancy. But, whether necessary or not, it was not warranted, I think, by any of the cases quoted as supporting it, and was contrary to some which the Court cited without disapprobation and to the Act itself. *Doe d. Groves v. Groves* (1847), 10 Q.B. 486, was mainly relied on. There Erle, J., expressly mentions the occasional residence of the owner as an answer to the claim of possession, and none of the four Judges, though concluding that the defendant was tenant at will and deciding against him, say whether it was a continuous tenancy or a succession of fresh tenancies. The decision, therefore, does not warrant the conclusion drawn from it in *Foster v. Emerson*. But in *Doe d. Bennett v. Turner* (1840), 7 M. & W. 226, and *Turner v. Doe d. Bennett* (1842), 9 M. & W. 643, both of which were quoted in *Foster v. Emerson*, and now in this case by the Divisional Court, the defendant claimed possession from 1817 till 1839; his landlord had, however, in 1827 entered and cut and removed stone from a quarry, which was held to have been a determination of the tenancy at will. The Court said: "If, indeed, the tenancy throughout the whole period had been one continuous tenancy at will . . . the right to bring an action . . . would have been barred:" 7 M. & W. at pp. 233, 234. There was not a continued tenancy at will, for the will was determined in 1827, and the jury on a second trial having found a new tenancy at will, the Court held that the plaintiff was not barred: 9 M. & W. 643. That case did not support *Foster v. Emerson* as to a continued tenancy, but was opposed to it.

In *Keffer v. Keffer*, 27 C.P. 257, the defendant, son of the plaintiff, claimed by possession from 1859 till 1876. In 1865, the father had, at the son's instance, mortgaged, and the son paid

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the mortgage, and in 1871 registered a discharge. The Court held that the mortgage was not intended to be and was not a determination of the original tenancy at will, but that the latter had continued throughout; and that, no fresh tenancy having been created, the plaintiff was barred. The cases were reviewed by Gwynne, J., and *Foster v. Emerson* was not followed.

But the Privy Council, in *Day v. Day*, L.R. 3 C.P. 751, upon the corresponding statute of New South Wales, clearly settled that the statute took effect, although the occupant continued to be tenant at will under a tenancy created more than twenty-one years before action; and their Lordships used the language previously quoted as to the creation of the fresh tenancy.

It is clear, I think, that, if the judgment of the Divisional Court proceeded upon the basis of the statute not taking effect because Frank Noble continued to be in possession up till the 1st April, 1906, as tenant at will under the original tenancy, it is not in accordance with the statute or the authorities; and, if it proceeded upon the basis of an assumed finding of any surrender or determination of the original tenancy and creation of a new tenancy before the 1st April, 1906, and within eleven years, it is not supported by any evidence.

The plaintiff's title to the equity of redemption became barred and extinguished on the 1st April, 1906. Subsequent admissions, if any, by the defendant or her husband, however valuable as evidence of the nature of the previous tenancy, could not revest the estate in the plaintiff.

What then was the effect of the plaintiff's payment of the mortgage and registration of the discharge? The Registry Act in force at the registration, 10 Edw. VII. ch. 60, sec. 62 (formerly R.S.O. 1897, ch. 136, sec. 76, and see now 1 Geo. V. ch. 17, sec. 31), declares that, "where a registered mortgage has been satisfied," the Registrar, on receiving a certificate of discharge in the statutory form, shall register it, "and the same shall be deemed a discharge of the mortgage, and the certificate so registered shall be as valid and effectual in law as a release of the mortgage, and as a conveyance to the mortgagor, his heirs, executors, administrators, or assigns, or any person lawfully claiming by, through or under him or them, of the original estate of the mortgagor." Then sec. 22 of the Real

Property Limitation Act, R.S.O. 1897, ch. 133 (now 10 Edw. VII. ch. 34, sec. 23), allows "any person entitled to or claiming under a mortgage of land" to bring action to recover the land within ten years next after the last payment on the mortgage. It is contended for the plaintiff that, even if his equitable estate was barred in 1906, the discharge reconveyed the land to him, and that he thereby became a person entitled to or claiming under a mortgage so as to have ten years from the last payment, the 29th February, 1908, within which to bring his action. The plaintiff must establish both propositions.

The Divisional Court considered that, "had the son acquired a title under the statute as against the father, yet, according to *Henderson v. Henderson*, 23 A.R. 577, the execution and registration of the discharge gave a new starting-point for the statute;" and again, "the mortgage in this case being paid off by the mortgagor, the effect is not to discharge the mortgage as against the assumed statutory owner, but to reconvey to the mortgagor his original title in fee, with the right to the possession as from the date of the repayment." And the Court cited *Lawlor v. Lawlor*, 10 S.C.R. 194, and referred to *Ludbrook v. Ludbrook*, [1901] 2 K.B. 96, where the assignee of mortgages of 1876 and 1882, on which interest had been paid till 1893 and 1888 respectively, was held not barred by possession from 1885 till 1899, although those having the equity of redemption were barred. It is not here questioned that the mortgagee was not barred, so that case does not touch the points involved.

In *Henderson v. Henderson*, title by possession was claimed by the son's widow, but the father had registered the discharge of a mortgage before the ten years had run against him; and, therefore, he was the only person in whose favour the discharge could operate as a reconveyance; so that, upon that point, it does not touch the present case. But MacLennan, J.A. (with whom Burton, J.A., agreed), held that by the discharge the father became a person claiming under a mortgage, and gained a fresh starting-point, and so was not barred, as but for the discharge he would have been, and he considered the case governed by *Doe d. Baddeley v. Massey*, 17 Q.B. 373. The Chief Justice and Osler,

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J.A., disclaimed any expression of opinion on this effect of the discharge; so that we have but the view of the two of the four Judges.

In *Keffer v. Keffer*, already referred to, the mortgagor was held barred in 1876, although there also a discharge had been registered in 1871, before being barred by possession from 1859; but the point does not appear to have been raised.

In *Lawlor v. Lawlor*, the only question was, whether the discharge obtained by the mortgagor, and registered while he was still owner, restored the estate tail which the mortgage had barred. It, therefore does not help us as to either of the points here raised. But it is to be noted that in that case Strong, J., said (10 S.C.R. at pp. 216, 217): "I think we are called upon to construe the words 'release' and 'conveyance of the original estate of the mortgagor,' as meaning that the whole estate which originally passed to the mortgagee, and of which the equity of redemption remains in the mortgagor, should be deemed to pass by the effect of the registration." And again (p. 218): "The statute clearly enough expresses that the whole estate held as a trustee by the satisfied mortgagee shall pass to his *cestui que trust*, the mortgagor, in as large an estate as that which the latter has in the equity of redemption vested in him at the time the certificate is registered." Referring to the fact that by the statute the discharge is to be valid and effectual as "a release of such mortgage," Strong, J., also said (p. 217): "I do not construe the release here meant as a mere release of the debt, for a release of a debt already paid and declared to be paid and satisfied by the certificate would be useless. I consider this expression as having reference to the legal estate held by the mortgagee." This language bears upon the present case, because here the plaintiff had no estate in the equity of redemption vested in him at registration of the discharge, and here also the mortgage money was certified to be satisfied.

It is, I think, clear that the decision of the Divisional Court is at least not a necessary result of the cases cited. I may here say that, whereas sec. 23 of the Limitations Act was passed for the protection of mortgagees, it does not seem to me at all necessary to that protection so to construe it that a mortgagor, satisfy-



ing the mortgage made by himself and getting it discharged, should be deemed a person claiming under it so as to prolong the time in his favour. So to prolong it is at least contrary to the policy in sec. 7(3) (1910 Act), which gives no extension where the person entitled to an interest in possession acquires another interest in "remainder, reversion, or otherwise" before the expiry of the ten years, and which declares both interests barred at the end of that time. The applicability of that provision to the case of a mortgagor was raised in *Ludbrook v. Ludbrook*, but it was not necessary to decide as to it. See *Carter v. Grasett* (1888), 14 A.R. 685, where discharge of a mortgage did not free the owner of the equity of redemption from an easement to which the mortgagee was not subject.

Let us look at the discharge. Originally adapted for cases where the mortgage was paid punctually without default and shewing that the mortgagee's title never became absolute, it was applied by the Legislature to be used in all cases, whether default had been made or not, provided the mortgage was "satisfied" and was to be "discharged." Up till 1865, 29 Vict. ch. 24, the statute declared that it would "have the effect of defeating any title remaining vested in the mortgagee," but should "not have the effect of defeating any other title whatsoever." It then operated as a conveyance to "the mortgagor, his heirs, executors, administrators, or assigns;" but, by 31 Vict. ch. 20, these words were added, "or any person lawfully claiming by, through or under him or them." The form of the discharge prescribed is a certificate "that . . . has satisfied all money due or to grow due on a certain mortgage made by . . . to . . . which mortgage bears date," etc., and "that such mortgage is therefore discharged;" and, as already mentioned, the form is to be used "when a registered mortgage is satisfied."

It is clear, I think, that, no matter whose name appears in it as having satisfied the moneys, the operation of the discharge must be always the same in any particular case. That name, so far as I can see, may be the name of a stranger to the title or of some one having only partial or contingent interest. The discharge certainly does not operate as a conveyance to him merely because he paid the money. See *Lee v. Howes* (1870),

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30 U.C.R. 292, where purchaser under execution acquired title by discharge stating payment by mortgagor; and see *Carrick v. Smith* (1874), 35 U.C.R. 348. If the mortgagor still remains sole owner, it operates as a conveyance to him. If he has conveyed all his interest to A. or to A. and B., it conveys, not to the mortgagor, but to his grantee or grantees or their grantees in turn; and, if there were two grantees, and one alone paid, yet the discharge would convey to both. If the mortgagor had conveyed or devised to A. for life, with remainder to B., the discharge would convey accordingly, and not to the mortgagor. The essential element is, that the mortgage-debt is satisfied by some one, and the mortgage is to be discharged, and so the legal or equitable estate of the mortgagee is to join the estate of and vest in the persons entitled to the equity of redemption for their proper shares or estates, but cannot, by such a document, vest in any person not entitled to the equity of redemption. Thus, if there were a second mortgagee, the legal estate of the first mortgagee would go to him still subject to redemption. If the mortgagor had conveyed or devised to A. in trust, the legal estate would go to A. likewise in trust, by the discharge.

I say nothing as to the effect a discharge may have as notice of any claim the person paying the money may have, but am speaking of it only as a conveyance. I would agree with the opinion of Street, J., in *Brown v. McLean*, 18 O.R. 533, that it should be taken as replacing the mortgagee's estate in the person best entitled to it; but I would add, as I think he meant, of those then having the equity of redemption and in the proportions or interests to which they may be entitled.

If the plaintiff's contention were correct, then, if this defendant had herself paid off the mortgage and registered a discharge of it, she would thereby have replaced the title in the plaintiff, whose right she is contesting, and whose estate had been extinguished. Sir Henry Strong, in *Lawlor v. Lawlor*, would appear to have had in mind that the discharge would only reconvey to those having the equity of redemption, when using the words I have already quoted, although they do not necessarily carry so far. In *Lee v. Howes*, also, the Court said (30 U.C.R. at p. 298):

“The statement in the certificate that the mortgagor had paid the debt would not vest in him the title, if he had then no title on which it could attach.”

If I am right that the discharge cannot operate in favour of one not having the equity of redemption, then it follows that it was not a conveyance to the plaintiff himself. He had had the equity of redemption, but that estate was “extinguished” by the Statute of Limitations. He still remained liable, however, on his covenant to the mortgagee for payment; but that did not give him a right to redeem. That was conceded and accepted by Stirling, J., in *Kinnaird v. Trollope* (1888), 39 Ch. D. 636. If sued upon the covenant, he could require the mortgagee to reconvey to him upon payment, and in such case the reconveyance would express that it was subject to existing equities: *Pearce v. Morris* (1869), L.R. 5 Ch. 227. But even this right to a reconveyance is not strictly a right to redeem, for he has nothing to be redeemed—no pledge which would be restored. It is a right based upon the same principle as that upon which a surety is, upon payment, entitled to the securities held by the creditor. There is no evidence here that there was even a request from the mortgagee to pay. A mortgagor having conveyed away his estate is not even a necessary party to a foreclosure suit, though remaining liable upon his covenant. Now here the mortgagor had not conveyed, but he had suffered such a state of circumstances to exist between him and the tenant let into possession by him, that the statute stepped in and extinguished his title. Upon principle he equally lost his right to redeem, that is, to pay the mortgage and obtain a conveyance, unless forced by the mortgagee to pay. If he did not wish the mortgage to be satisfied and discharged, he was not bound to accept a discharge: *McLennan v. McLean* (1879), 27 Gr. 54; and he could have obtained a conveyance from the mortgagee by deed to him, or he might have arranged, as no doubt he could, for an assignment of the mortgage to some one for him. If he had a right to redeem, our statute (Mortgages Act, 10 Edw. VII. ch. 51, R.S.O. 1897, ch. 121, sec. 2) would entitle him to require an assignment. He did none of these things, but chose to act as if the owner of the land was to be

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benefited by his payment, and that owner was then his son. See *Lord Gifford v. Lord Fitzhardinge*, [1899] 2 Ch. 32, as to reconveyance declaring mortgaged property absolutely discharged.

But to whom did the discharge convey the legal estate, if not to the plaintiff? The statute says to the mortgagor or his assigns or any person lawfully claiming by, through, or under him. According to *Tichborne v. Weir* (1892), 8 Times L.R. 713, the son, Frank Noble, would not be assignee of his father's estate. There the defendant was held not to be assignee of a lease so as to be liable to the lessor on the lessee's covenants to repair, although the defendant had taken an assignment of the lease from one who, however, was really only equitable mortgagee of it by deposit of deed, and although the mortgagor, the lessee, was barred by length of possession. That, of course, came up in a very technical shape. But in *Dawkins v. Lord Penrhyn* (1878), 4 App. Cas. 51 (H.L.), Lord Cairns, L.C., said (p. 59): "The Statute of Limitations . . . says that . . . the title shall be extinguished and pass away from him who might have had it to the person who otherwise has the title by possession." Lord O'Hagan said (p. 66): "It would operate as a complete transfer of title from one person to another, and as an absolute extinction of a right." And Lord Penzance (p. 64) quoted with approval the words of the Master of the Rolls, that "it is not a bar of the claim, it is a divesting of title, or a transference of title to somebody else." And in *Thornton v. France*, [1897] 2 Q.B. 143 (C.A.), Chitty, L.J., at p. 154, spoke of the 34th section (in Ontario 10 Edw. VII. ch. 34, sec. 16), "which transfers the estate which is barred." Other eminent Judges have used similar expressions.

The statute, it is true, only uses the word "extinguished." That does not mean extinguished for all purposes. For instance, if a life tenant's estate is so extinguished, it does not entitle the remainderman to enter. If a mortgagor is barred by possession of a claimant, that does not entitle a mortgagee to hold the property free from any redemption. The new owner in possession has the equity of redemption. That was decided by Lord Brampton (then Hawkins, J.) in *Fletcher v.*



*Bird* (1896), reported in *Fisher on Mortgages*, 6th ed., p. 1025, where the mortgagor was barred by possession from 1869 till 1895, but his two daughters took the precaution of having a mortgage of 1868, on which interest had been kept paid-up, assigned to the plaintiff as their nominee, and the plaintiff was held entitled to possession, but the defendant to have the right to redeem. I agree with that decision. In the instances referred to of a person claiming the estate of a life-tenant or a mortgagor, it cannot be that the statute extinguishes the estate for the sole benefit of the third party. It was passed for the settlement of disputes and the simplification of proofs and rendering unnecessary in many cases the presumption of lost grants which would in truth make the defendant an "assign" of the estate. It would be a singular effect if it ended the dispute by giving the estate to some one else.

The plaintiff, before 1906, had the equitable estate in fee. while the mortgagee had the legal estate in fee. In 1906, the plaintiff lost his estate in fee, and the son acquired an equitable estate in fee. He acquired, by possession and the statute, not merely a right to resist ejection, but an actual title such as might be forced upon a purchaser in proper circumstances. There cannot be two equitable estates in fee at one and the same time in the same property. The father had one; he no longer has it. The son has acquired one. It can only be the father's, for it was only the father who was barred. Now, whether the son is technically an "assign" of the mortgagor or not, he was by the mortgagor made tenant, and continued as tenant until the statute took effect upon that relationship and extinguished the father's interest in favour of the son. In the present circumstances, Frank Noble was, in my opinion, "a person lawfully claiming by, through, or under" the mortgagor, within the meaning of the Registry Act; and, if the discharge had been registered in his lifetime, it would have conveyed the legal estate to him, the only owner of the equity of redemption.

If, then, the plaintiff took no estate under the discharge, it is really unnecessary to consider the other question, whether he would be a person "claiming under the mortgage." It is more difficult to maintain that he is so in this Province, where a

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discharge is used which implies and declares the complete satisfaction and discharge of the mortgage as if no claim existed under it, than in England, where the conveyance is by deed to a particular person and generally setting out the facts. If this plaintiff had been called upon by the mortgagee to pay pursuant to his covenant, after his own interest in the land was barred, and when the payment would be relieving another's land, and if, on payment, he had taken a reconveyance by deed, shewing his intention to keep the claim alive, I do not see why he should not be looked upon as claiming under the mortgage. But, in the circumstances of *Henderson v. Henderson*, it does not seem to me that the mortgagor should be so considered, the land being his own when the mortgage was paid. In *Doe d. Baddeley v. Massey*, referred to by Maclellan, J.A., as governing *Henderson v. Henderson*, the holders of the mortgage had joined with the mortgagor in a conveyance to one Child, the predecessor in title of the plaintiff's lessor, and it was held that the latter was a person claiming under the mortgage, and it was said that in no other way could the statute be made effectual for the protection of mortgagees. But it would appear from an admission by the plaintiff's counsel, although nowhere else clearly in the report, that the mortgage was paid off before Child acquired the title; and the Court said that, "on payment of the mortgage money, the mortgage ceases to exist as a security for money, but the person to whom the mortgagee conveys his legal interest claims under the mortgage, although his equity of redemption should likewise be conveyed to him." Now that was an action of ejectment at common law, in 1851, when the possession of the legal estate was sufficient, there being no relief at law except such as would be afforded by 7 Geo. II. ch. 20 (C.S.U.C. 1859, ch. 27, secs. 74, 75). But now, if the mortgage had ceased to exist as a security for money, the mortgagee could not obtain possession by virtue of the bare legal estate against the owner of the equity of redemption; and, if he could not, neither could he confer it by a conveyance. It is, I think, manifest that the bare legal estate carried with it in that case the right to possession, and that was all the Court had to deal with.

Now in *Thornton v. France*, [1897] 2 Q.B. 143, the Court of Appeal considered that *Doe d. Baddeley v. Massey* might be "open to some question as being inconsistent with the judgment of the Court of Appeal in *Heath v. Pugh*, 6 Q.B.D. 345, that to be within the Act the mortgage must be a subsisting mortgage," which is practically the same point; and the last-mentioned judgment was affirmed in *Pugh v. Heath*, 7 App. Cas. 235. In *Thornton v. France*, the holders of a mortgage of 1865 joined in 1875 in a conveyance to a purchaser, who, after mortgaging to one Robinson in 1886, conveyed to the plaintiff in 1890, and the plaintiff in 1892 paid off the 1886 mortgage, but had not obtained a reconveyance. This absence of a reconveyance did not affect the decision, as the Court dealt with the plaintiff's equitable rights, and said that he was in no worse position because the 1886 mortgagee was not added as a plaintiff. The Court said that if *Doe d. Baddeley v. Massey* was right "it would . . . apply to the purchase deed of . . . 1875, so that the statute would not have run against (the purchaser) till . . . 1887; but it would not apply to the later title of the plaintiff, who, in no possible sense of the term as used in the statute, could be said to claim under a mortgage until he paid off Robinson's mortgage in 1892, when the statute had already run against the plaintiff. . . . Whether questionable or not, the decision (in *Doe d. Baddeley v. Massey*) does not govern the present case. In our opinion, the plaintiff does not claim under a mortgage within the meaning of the Act." From an earlier part of the judgment, I understand the Court to mean that the plaintiff, paying the mortgage made by his grantor, was in no better position than if it had been made by himself, and impliedly that a mortgagor, paying his own mortgage, does not acquire a new right of entry, at least if he himself was already barred. I also take it that, while *Doe d. Baddeley v. Massey*, if right, would apply to protect a purchaser taking his conveyance from both mortgagee and mortgagor, it would not apply to protect a mortgagor paying off his own mortgage after he was barred. In a case like the present, where he voluntarily pays it off and declares it to be "satisfied" and "discharged" and "released," I would have no hesitation

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in holding that, even if he acquired by the discharge the bare legal estate, he would not be a person claiming under the mortgage a right to possession, because under the mortgage no such right in equity existed in the mortgagee, and the Courts are now Courts of both law and equity. On this point, also, I would find for the defendant.

It was also contended for the plaintiff that the defendant was estopped from denying his title because she had obtained possession from Smith, to whom he let the property, and who obtained possession from him—but this is sufficiently answered by the finding of the learned Chief Justice at the trial, that the plaintiff acted as the defendant's agent in the letting, which finding was, I think, warranted by the evidence.

The appeal should, in my opinion, be allowed, and the judgment for the defendant restored, and the costs of both appeals allowed to her.

MEREDITH, J.A. (dissenting):—The provincial enactments providing for the limitation of actions respecting real property are to be deemed remedial, and to be interpreted accordingly. Their effect is not to be minimised because of the strong expressions which have sometimes been applied to them, nor because, looking at them from one point of view only, there may always be instances in which those who feel their weight may think that such expressions were not misapplied; though in truth when fairly looked at from all points of view, in the interests of the public generally, their usefulness, if not indeed their need, is obvious; and this case comes within them.

The character of the tenure of the plaintiff's son is not in dispute; he became tenant at will of his father; and, under such enactments, the father's right to begin such an action as this first accrued at the expiration of one year after the commencement of that tenancy, and was completely barred if not brought within ten years thereafter.

But that bar, of that right of action, would not of course bar any other right which might afterwards arise; and so if a new tenancy were created, giving a new right of entry, this



action may be maintained if that right also has not been in like manner barred.

There is no suggestion of the creation of any new tenure, or of any new right of action, except one of the same character. It is said that from the conduct of the parties, during the son's occupancy, it may be inferred that a new tenancy at will, or new tenancies at will from time to time, were created, which would have given a new right, or several new rights, of entry within ten years before the commencement of this action. But the question is not what may be imagined; it is only what was the actual fact; and it is not justifiable to magnify or minimise the facts in order to prevent the operation of the law.

Upon the whole evidence I can find nothing to warrant the conclusion that there was at any time, from first to last, any change in the tenure under which the son entered upon and held the land. Why should there be? The relationships, in all respects, between father and son continued the same throughout; the reasons for giving the use and occupancy of the house and lot to the son, and for that occupancy continuing during the first year, remained just the same throughout his life.

Four things seem to have been relied upon by the Divisional Court as evidence of a new holding: (1) the father paid wages to the son and allowed him to live rent-free upon the land; but so it was at the beginning and during the first year—if there be anything substantial in these facts; (2) the father paid the taxes upon the property, but so he did, as much as it was done by him, from the beginning; and might do consistently with ownership in the son; (3) he paid for materials used in the repair of the house and was a frequent visitor there: things which in no way shew any change in the tenure, and indeed are quite consistent, as the other things also are, with ownership in the son; and (4), after the expiration of the period of ten years, the father let the property, with the widow's consent, for her benefit: a thing again giving no evidence of a change of tenure from first to last, and also quite consistent with ownership in the son, acquired by length of possession in his lifetime.

Not only was the creation of a new tenancy within the ten years not proved, but, in my opinion, there was no reasonable

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evidence of it. The case might not be the same as it is if it were not one of father and son, and indulgent father, and, in some things, improvident son at that.

Upon the other ground, however, the plaintiff is, in my opinion, plainly entitled to succeed in this action. Before the statute began to run in the son's favour, the father mortgaged the lands, and, admittedly, the mortgagee was never barred by length of possession by any one. Then, being seized of the legal estate in the lands, and the mortgage being registered, the mortgagee gave to the mortgagor a certificate of discharge of the mortgage in the manner provided for in the provincial enactment respecting the registration of deeds; and that certificate, being registered, became, under that enactment, "as valid and effectual in law . . . as a conveyance to the mortgagor . . . of the original estate of the mortgagor;" and so the father became entitled to a new right of entry which he can enforce in this action.

It was contended that no greater effect should be given to the registered certificate of discharge than if it were a mere release of the mortgage; but why so? But for the enactment, a reconveyance would be, in this case, necessary, and the discharge is a simple method of evidencing payment of the mortgage and reconveying the land; the enactment expressly and plainly provides that it shall be a conveyance of the land as well as a release of the mortgage. It is immaterial whether the plaintiff could or could not have enforced redemption; he has redeemed, and has a conveyance of the land to him; being out of possession, and having lost his right of re-entry, the registered certificate of discharge could be effectual only as a valid conveyance of the lands to him.

Upon this ground, but upon this ground only, the judgment of the plaintiff's favour should, I think, be affirmed.

In view of the contrary opinion which the other members of the Court have now reached and expressed, upon this point, it may be fitting that I should add a few words to the foregoing words—which were written at the close of the argument—indicating why I am unable to agree in their conclusion or reasoning.

Unless my eyes are dimmed by the sight of a needy widow

and child, how can I consider that those who are in no sense claiming under, but are claiming against, the mortgagor, are "his heirs, executors, administrators, or assigns, or any person lawfully claiming by, through or under him or them?" It is only because they, and he through whom they do and can alone claim title—their husband and father—have so long been in possession of the land to the exclusion of the true owner, the mortgagor, that they have any sort of claim upon it. But, if this were not so, or if one could disregard the plain meaning of plain words, another insuperable difficulty would present itself. The obvious purpose of the enactment was, not in any sense to alter the legal rights of the parties concerned, but to provide, in the circumstances covered by it, a simpler and less costly way of obtaining and registering evidence of satisfaction of the mortgage and a reconveyance of the land; in short, a short form of conveyance; nothing more; this is incontrovertible; so a sure test of its effect is found when we find what would have been done if legislation had not provided this easy means of reconveyance; in other words, if we consider for a moment what the short method has replaced; and obviously it has replaced a reconveyance by the mortgagee to the mortgagor upon payment by the mortgagor of the mortgage; I speak of course of this case; in which there can be no kind of contention that the money was not paid and the certificate of discharge obtained by the plaintiff for his own benefit and in his own name; whether or not of his own bounty he might, but for this litigation, eventually have let the widow and child have the property free from the mortgage.

The plaintiff having paid the mortgage moneys and interest for his own benefit, what right have we, what right has any one, for charity's sake, or for any other purpose or reason, to convert that payment into a payment made by or on behalf of the widow and child; to so convert it without the consent and against the will of him who paid the money and whose money it was?

Default having been made in payment at the times and in the manner provided for payment in the mortgage, the legal estate was vested in the mortgagee absolutely; and it was within

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his power and right to convey that estate to any one, no matter whom; what right, then, to exclude the mortgagor; and he, having paid his money for such a conveyance of it to him, why is he not entitled to the benefit of such a conveyance, at least, whatever might be thought of the effect of a statutory discharge of mortgage? Doubtless the Legislature could extract charity from the plaintiff for the widow and child, and doubtless it could provide that a payment made by one for his own benefit should not enure to his benefit, but should benefit some other definite or indefinite, certain or uncertain, person or persons, but doubtless it never did and never would; and doubtless, if it ever could and did, no one would part with his money to be so so dispensed against his will.

Whether the widow and child have, or either has, a right of redemption from the plaintiff, is not now in question: it will be time enough to deal with it when it arises. All that the plaintiff seeks is possession of the lands, and that he is entitled to, whether or not any right of redemption exists.

No case has been found that decides or says anything contrary to the view of this case which I have expressed; indeed the cases are distinctly in favour of it. The observation of Street, J., as to what might or would be his preference in an event which did not arise in the case he was dealing with—so much relied upon for her—does not help the defendant in this case. “The person best entitled” is a very indefinite expression; but, in this case, who can be “the person best entitled” to, at least, the legal estate in the land, but he who bought and paid for it with his own money for his own benefit—the plaintiff? However, the question is not what preference any one may have, not what words may have been or may be used elsewhere; we are bound by the plain words of the statute, which, as applied to this case, are: “and the certificate so registered shall be as valid and effectual in law as a release of the mortgage, and as a conveyance to the mortgagor . . . of the original estate of the mortgagor;” whether or not it has any effect upon the equity of redemption which alone was acquired by length of possession.

Of course, if we forget or ignore the fact that, payment



having been made *post diem*, the legal estate was absolutely in the mortgagee, and could be got back only by means of a conveyance in some form, the way towards helping the defendant is made easier, but it is none the less an illegal way.

In regard to the suggestion that the plaintiff may not be a person "claiming under a mortgage of land," let me ask what else can he be claiming under? If we do not lose sight of the real position of the parties in the eyes of the law, what ground can there be for any such suggestion? The plaintiff was entitled to an equity of redemption in the land; the mortgagee was entitled to the legal estate and all other interests in it not comprised in that equity, and he had the power to sell and convey that legal estate to whomsoever he pleased, but subject of course to that equity; it was not necessary that he should assign the mortgage: according to the defendant's contention, she has acquired by length of possession, and the plaintiff has lost, that equity of redemption; and then the plaintiff for his own benefit paid his own money to the mortgagee for and obtained from him a statutory conveyance, *under the mortgage* to him, of the land; and is now *by virtue of it* the legal owner: his sole right to possession, and therefore to bring this action, is under the mortgage: so that it seems to me to be idle to suggest that he may not be claiming under the mortgage, which is in truth the whole foundation of his right to the land.

It must not be forgotten, in dealing with any of the cases, that we have to consider the effect of the Registry Act, a consideration which does not apply to many of those referred to on the argument of this appeal, and in some of the opinions expressed in this Court. The object of that enactment is to make plain in the registry offices the title to all lands—generally speaking—in this Province; to guard purchasers against rights not registered of which they have not had actual notice. In furtherance of those objects it provides for a short and simple form of conveyance of mortgaged lands to certain persons, so keeping the title plain and clear in the registrar's books; but this Court says that the conveyance, though bought and paid for by one of the persons named in the Act—the mortgagor—and taken, as far as it can be taken, in the short statu-

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tory form which the Act provides, in his name and in his name only, passes no right or title to him, but conveys the land to one who, so far as registration goes, has no title to it, nor does her name in any manner or in any way appear in connection with the ownership of or title to the land: a curious method of giving effect to the purposes of the enactment. Can it be doubted that, if the conveyance had been to a stranger, the legal estate would pass to him, whatever the form of the conveyance might be; and is there any good reason why it should be different with the plaintiff? To any one having actual notice of the right acquired by length of possession, that right would remain valid against stranger or plaintiff alike; but a right to redeem only, for that is all that was so acquired.

And in this connection let me add that, if we are to be painfully technical, what evidence is there that the mortgagor's right of entry first accrued ten years before the commencement of this action? Why is the plaintiff obliged to reply upon sec. 22 of the limitation of actions enactment only? What evidence is there that he came within any of the limitation provisions contained in it?

In truth the case seems to me a very simple one, affording little excuse for the many words I have devoted to it, indeed less lines than pages written should make my opinion plain; the defendant, by length of possession of her husband, has ousted the plaintiff from and has acquired for her husband's heirs the equity of redemption of the land in question; the plaintiff has acquired, under the mortgage, in his own name, with his own money, and for his own benefit, the legal estate in the land, at the least; and so the defendant is entitled only to redeem the land, from him, at the most; and, consequently, the plaintiff is now entitled to possession, the only relief which the judgment in appeal gives him, and all that he sought in the action.

A word should be added regarding the plaintiff's offer to give to the defendant all there is in the land except the sum paid by him to acquire from the mortgagee the title which he now has; surely a reasonable offer if viewed from the standpoint of the legal and equitable rights of the parties and not from that of charity—out of some one else's pocket. By what some

Judges have called "legalised robbery," the plaintiff has been deprived of his equity of redemption: I decline to be a party to that which might, with more excuse for the language, be called "judicial robbery" of the money which the plaintiff paid out of his own pocket for his own benefit, and apply it to the benefit of those who were guilty of the legalised robbery, upon the entirely and palpably untrue in fact ground that it was paid for their benefit.

If I am right, there was no need for any amendment of the plaintiff's statement of claim; indeed, if he were in any manner—legal or equitable, as owner of the legal estate or merely as in equity entitled to all the rights of the mortgagee—entitled to possession, why should any amendment be needed?

On the other hand, if an amendment were necessary, it was, in my opinion, the duty of the Court to permit it to be made; the Rules of the Court imperatively required it, and they have the force of statutory enactment; and the interests of all concerned—the parties, the Courts, and public interests—required it; those of the parties imperatively; for what excuse can be offered for putting them to the great expense in money, and all the wear and tear and worry and anxiety of a second trial over a question which could have been just as well, indeed much better, tried and disposed of in this action?

*Appeal allowed; MEREDITH, J.A., dissenting.*

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[IN THE COURT OF APPEAL.]

MCDougall v. Grand Trunk R.W. Co.

*Railway—Injury to Passenger Alighting from Vestibuled Train—Invitation to Alight—Descent after Train Set in Motion—Negligence of Railway Servants in Keeping Doors Closed—Negligence of Passenger—Wrongful Entry upon Pullman Car—Proximate Cause of Injury—Reasonableness of Passenger's Conduct—Findings of Jury and Trial Judge—Evidence.*

The plaintiff, taking a short night journey in a vestibuled train of the defendants, was seated at the rear end of a day-car, behind which was a Pullman sleeping car. When the train reached the plaintiff's station, he went out of the door of the day-car at the rear end upon the vestibule platform, and there, finding (as he said) that the doors for exit at that vestibule were closed, he went through the sleeping-car, and

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alighted from the train by opening and using an exit-door at the rear end of that car; but this was after the train had started again; and the plaintiff was injured. It appeared that an exit-door at the front end of the day-car was open. In an action to recover damages for the injury suffered by the plaintiff, the jury found, upon conflicting evidence, that the exit-doors at the rear end of the day-car were closed, as the plaintiff said; and the trial Judge, with the assent of counsel on both sides, determined the other questions arising in the case, and gave judgment for the plaintiff:—

*Held*, that, there being evidence to support the finding of the jury, it could not be set aside.

And *held* (MEREDITH, J.A., dissenting), that what the plaintiff did was, in the circumstances, reasonable; and that the defendants were liable. *Keith v. Ottawa and New York R.W. Co.* (1902), 5 O.L.R. 116, specially referred to.

*Per* GARROW, J.A.:—Conceding that the plaintiff had no right under his ticket to enter the sleeping-car, he had at least a right to alight from the train; it was the neglect of the defendants' servants to open or to keep open the rear door which put him in the difficulty; it was no answer in law to say that, the train being again in motion, the invitation to alight was cancelled; allowance must be made for the natural desire of a passenger not to be carried beyond his destination.

*Per* MACLAREN, J.A.:—The defendants, having negligently closed the plaintiff's natural means of getting off the train without notice to him, were guilty of negligence in starting it before he had sufficient time to get off by the means he adopted, which, in the circumstances, was not a negligent or unreasonable or improper way or method; and the injury he sustained was the direct result of such negligence.

*Per* MEREDITH, J.A.:—Upon the whole evidence, there was negligence on the part of the defendants in not affording reasonable means of alighting from the train at the rear vestibule, during the stop at the plaintiff's station; but that negligence was not the proximate cause of the plaintiff's injury; the accident was due to the want of ordinary care on the plaintiff's own part.

Judgment of MEREDITH, C.J.C.P., affirmed.

AN appeal by the defendants from the judgment of Sir WILLIAM MEREDITH, C.J.C.P., at the trial, upon the findings of a jury, in favour of the plaintiff.

The following statement of the facts is taken from the judgment of GARROW, J.A.:—

The action was brought to recover damages caused to the plaintiff while a passenger on the defendants' railway by reason of insufficient provision to enable him properly and safely to alight from the train upon which he was travelling, upon its arrival at Weston station.

The plaintiff and his friend, John Gibney, had left Toronto together, bound for Weston, a station a few miles to the west of that city, where the train arrived a little before midnight. They were seated in a passenger coach of the ordinary description, so far as appears, connected at its rear end with a Pullman coach, the whole being what is called a vestibuled train. There



was a door of exit at each end of the passenger coach. The forward door was open, but there was conflicting evidence whether the rear door also was open.

The plaintiff and his friend tried the rear door, near which they had been sitting; and, finding it, as they say, locked, they passed through the Pullman coach and alighted from the rear platform of that coach after the train had commenced to move; Mr. Gibney, who was first, alighted without difficulty; but the plaintiff, in alighting immediately afterwards, fell and was severely injured. In passing through the Pullman coach, they met the porter, who was apparently in charge. He asked if they desired to get Pullman accommodation, and, getting a negative reply, did not order them out or attempt to turn them back or otherwise prevent them from proceeding to the rear platform as they did.

It is not asserted that the stop at the station was not of sufficient length to have enabled the plaintiff and his friend to alight under ordinary circumstances.

At the close of the evidence for the plaintiff, counsel for the defendants moved for a nonsuit, which was reserved, and renewed at the close of the whole case, when this took place:—

“Mr. Hellmuth (for the defendants): I would submit that on the whole case —

“His Lordship: I am entirely against you. I think the defendants are liable. You put them on this train; you invited them to alight; when they went to the proper place to alight, they could not get exit from the car. They were not bound to remain on the car. They went to see if they could find some place of exit; and, finding none, they made their best way out.

“Mr. Hellmuth: I think, with great respect, that all the cases proceed on the ground of invitation; and where they find, as they say they did, a closed door and trap-door down, there was no invitation.

“His Lordship: I will rule the other way. What question of fact is there in this case to submit to the jury?

“Mr. Hellmuth: The time the train stopped.

“His Lordship: Is there any other important question than whether Gibney and the plaintiff are right as to the condition

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of the vestibule between the second day-car and the first Pullman? What I propose to do, unless there is some objection that strikes me as formidable to it, is to ask the jury just the one question, whether the vestibule was closed, as the defendants say, or whether it was as the plaintiff and Gibney say, and as to the damages; and any other question I will determine without the aid of the jury.

“Mr. Hellmuth: I suppose those are questions of law more than of fact.

“His Lordship: Yes, largely. Of course, the evidence as to the time the train stopped there varies very much, from a minute and a half to three minutes. I suppose nobody could say—I do not know how that is—nobody could say that these men had not time enough to get off.

“Mr. Heighington (for the plaintiff): No; I do not think we shall contend that we had not time to alight if the doors were open.

“His Lordship: Does not the whole case turn on whether the door was closed, and then the question of law as to whether, in the circumstances, the men were justified in doing as they did? The only question there that might be asked the jury is, whether they did what was right under the circumstances; but I think I will pass upon that. I will just ask the jury to assist me on one question of fact and the damages.

“Mr. Hellmuth: I do not know that I can object to that. Of course, my accepting your Lordship’s doing that does not mean that I would be bound by the findings as to this.

“His Lordship: Certainly not.”

Accordingly, the only questions submitted to the jury were: (1) “Were the trap-doors down and the vestibule doors closed between the car upon which the plaintiff was a passenger, and the Pullman car in rear of it, when the train came to a stop at Weston?” to which they answered “Yes:” and (2) the amount of the damages, which they fixed at \$2,500; for which amount the plaintiff has judgment.

September 23 and 24. The appeal was heard by GARROW, MACLAREN, MAGEE, and MEREDITH, JJ.A.

*I. F. Hellmuth*, K.C., for the defendants. The finding of fact by the jury as to the doors at the rear of the car being closed when the train came to a stop at Weston was not warranted by the evidence; and, even assuming that they were closed, the inference drawn by the learned Chief Justice that there was an invitation to the plaintiff to alight as he did, was erroneous, and can be reviewed by this Court. The plaintiff had no right to be upon the Pullman car, and the defendants were under no liability to him while upon or when leaving that car. I refer to *King v. Northern Navigation Co.* (1912), 27 O.L.R. 79; *Edgar v. Northern R.W. Co.* (1884), 11 A.R. 452. [MEREDITH, J.A., referred to *Clayards v. Dethick* (1848), 12 Q.B. 439, cited in *Smith on Negligence*, 2nd ed., appx. B., at p. 275, and referred to in *Keith v. Ottawa and New York R.W. Co.* (1902), 5 O.L.R. 116, *per Osler*, J.A., at pp. 126, 127.] In the *Keith* case, there was an invitation, and sufficient time was not allowed, so the case is distinguishable. This is a case of conflicting evidence, and it is submitted that the balance is clearly in favour of the defendants.

*F. E. Hodgins*, K.C., and *A. C. Heighington*, for the plaintiff. The facts in the case are simple, and the finding of the jury as to the doors at the rear of the day-car being closed was warranted by the evidence. The plaintiff and his companion acted as reasonable men would, in such an emergency, and the defendants were guilty of negligence in obstructing their passage as they did. In the circumstances, the plaintiff was not a trespasser upon the Pullman car, and the appellants are liable for his injuries received in alighting from it. The defendants were negligent in shutting the door of egress, and failing to notify the plaintiff that this had been done. The plaintiff was accordingly misled, and, so to speak, imprisoned in a trap. Reference was made to *Chicago, etc., R.R. Co. v. Mehlsack* (1889), 19 Am. St. Repr. 17, 20; *Arnold v. Pennsylvania R.R.Co.* (1887), 119 Pa. St. Repr. 135; *Williams v. Pullman Palace Car Co.* (1888), 8 Am. St. Repr. 538; *Thorpe v. New York Central, etc., R.R. Co.* (1879), 76 N.Y. 402.

*Hellmuth*, in reply, argued that the American cases cited only stated the principle that a passenger was not a trespasser before paying his fare. The plaintiff knew that the car from

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which he alighted was a Pullman. No actionable negligence has been proved on the part of the defendants.

November 19. GARROW, J.A. (after setting out the facts as above):—The case involves one or more rather nice questions; but, upon the whole, I do not see any good ground upon which we can interfere. The defendants cannot complain of the somewhat unusual course adopted at the trial, because counsel assented. All that now seems open is the question whether there was reasonable evidence to justify the inferences and findings made by the learned Chief Justice; and I find it impossible to say that there was not. The plaintiff had, in the absence of timely information to the contrary, a right, it seems to me, to expect to find the rear door of the passenger coach open, in which case he could easily have alighted there in the time allowed. He might even have gone, after finding the rear door closed, to the front door, which was open—and still have alighted in plenty of time. Instead, he proceeded through the Pullman coach, into which, it may be conceded, he had no right under his ticket to enter. But that is not the real question. He had a right to alight from the train; and, having at last reached an opening from which he could alight, the real question must, I think, be, might he then alight, the train having commenced to move—in other words, was what he did, under all the circumstances, reasonable? In the opinion of the learned Chief Justice, it evidently was, and I am not prepared to differ from that conclusion. It is easy to say, after the event, that the plaintiff would have escaped injury if he had gone to the front door instead of the rear door, or to the front door after finding the rear door fastened, as, upon the findings of the jury, it must now be assumed that it was. But the time allowed for deliberation was at the best very short; and, finding the rear door closed, it was almost as easy for him to reach the rear of the Pullman coach as to return to the front door of the passenger coach. It is not to be forgotten that it was the act of the defendants' servants in failing to open or to keep open the rear door which put the plaintiff in the difficulty. Nor is it an answer in law to say that, the train being again in motion, the invitation to alight was thereby cancelled. Allowance



must be made for the very natural desire of a passenger not to be carried beyond his destination, especially at so late an hour. It must, therefore, always, in such cases and under such circumstances, be a question of the reasonableness of what was done—a question which was rather recently considered in this Court in *Keith v. Ottawa and New York R.W. Co.*, 5 O.L.R. 116.

I, therefore, see no alternative but to dismiss the appeal with costs.

MACLAREN, J.A.:—The plaintiff was a passenger from Toronto to Weston, a western suburban village, where, on descending from the train, he fell and was run over by the rear car and lost an arm. The jury awarded him \$2,500.

The chief dispute was, whether the vestibule doors at the rear of the day-car, in which the plaintiff and a friend were riding, were open or closed while the train was standing at the Weston station. It was assumed throughout that, if these doors were closed, it would be negligence on the part of the company. The conductor and the brakeman of the train swore that they had remained open as usual from Toronto, and were only closed after the train started from Weston. The plaintiff and his companion, Gibney, swore that they were in the rear seat of the rear day-car; that, when "Weston" was called out, and the train was slowing down, they rose and went into the rear vestibule; and, finding all the doors closed, Gibney tried first to open the doors at the rear of the day-car; and, finding them "stuck," he next tried those at the front of the first Pullman, with a like result. He then rushed into the Pullman car, followed by the plaintiff, and, passing the porter, hurried into the rear vestibule, reaching it just as the train was starting. Gibney opened these vestibule doors and descended safely to the ground east of the station platform. The plaintiff, following him closely, tried to do the same, but stumbled and fell under the rear car, near the eastern end of the platform, with the result stated.

The learned Chief Justice, with the acquiescence of counsel, submitted only two questions to the jury, reserving to himself the decision of the other points in the case. The two questions and the answers of the jury were: "(1) Were the trap-doors

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down and the vestibule doors closed between the car upon which the plaintiff was a passenger and the Pullman car in rear of it, when the train came to a stop at Weston? A. Yes. (2) At what sum do you assess the plaintiff's damages? A. \$2,500."

His Lordship thereupon held that the plaintiff had acted reasonably in what he did, and that there was nothing in the rate at which the train was proceeding to make it manifestly dangerous for him to attempt to get off the way he did, and entered up judgment for \$2,500. The evidence was that the train was going at the rate of three or four miles an hour when the plaintiff fell. The finding of the Chief Justice as to the danger is quite in accord with the principles laid down by this Court in *Keith v. Ottawa and New York R.W. Co.*, 5 O.L.R. 116, which in some respects is similar to this case; and the correctness of his decision on this point was not challenged by the defendants either in their reasons of appeal or the oral argument before us.

Counsel for the defendants, however, contended that, on the evidence, the jury should not have found that the rear vestibule and trap-doors of the day-car in which the plaintiff was riding were closed during the time the train was standing at Weston station. On the one hand, they had the conductor and brakeman (two interested witnesses) swearing that they were not; while, on the other, they had the plaintiff and Gibney (only one of them interested) swearing the opposite, and giving particulars of Gibney having actually tried to open them before the train started. They believed the latter, as it was their privilege to do, and no sufficient reason has been given to us to interfere with their verdict on this point.

While the counsel for the defendants, as just stated, did not criticise the holding of the trial Judge as to the speed of the train not making it manifestly dangerous or negligent for the plaintiff to attempt to alight, he did urge very strongly that, as the plaintiff had only a first-class ticket, he had no right to enter the Pullman at all; that he was a mere trespasser, to whom the company owed no duty (probably the first time on record on which such a claim was put forward); and that, the vestibule and trap-doors being closed, there was not only no invita-

tion to him to alight that way, but an express prohibition to attempt it.

I do not think that the fact of the plaintiff being only a first-class passenger has anything to do with the present case. A first-class or even a second-class passenger may have a right under certain circumstances to pass through a Pullman car in embarking upon or alighting from or in simply passing through a train. The question is: did he act reasonably? It may be noted here that there is no evidence that the plaintiff knew that this car was a Pullman until he had got some distance inside and saw the berths made up, and by that time he was much nearer the exit in the rear, and would know that he could reach it much sooner than that in front, if such a thought as turning back had then occurred to him.

Bearing in mind that the only point on which there was a conflict of evidence has been disposed of by the verdict of the jury, what are the proved facts that are material to the case? The plaintiff, after the brakesman called out "Weston," as the train was slowing down, went to the proper place for him to alight, no notice having been given to him to go elsewhere. Finding all the doors closed, his companion, who was in front, tried first to open the vestibule doors of the day-car; and, finding them "stuck," next tried those of the front of the Pullman, with a like result. Then they started to go through the Pullman car. It was argued that he should have turned back and gone to the front of the day-car. He did not know that that was open to him any more than the place they had just tried. It was perhaps even more natural that they should continue to press on in the direction they had started rather than retrace their steps. But the plaintiff, from his experience, knew that the train stopped only one or two minutes, and he had now only some seconds to make his exit. A man who, in such an emergency, comes to a decision that may not be the wisest, is not on that account necessarily negligent. It was quite natural that he should follow his friend where the way was apparently clear and where the friend made his way out in safety. Although the defendants had negligently closed him in, it was his duty to make all reasonable efforts to get off, rather than to

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remain passive and then seek damages from the company for having carried him beyond his destination. The company, having negligently closed his natural means of getting off the train without notice to him, were guilty of negligence in starting the train before he had sufficient time to get off by the means he adopted, which, under the circumstances, was not a negligent or unreasonable or improper way or method; and the injury he sustained was the direct result of such negligence. I can find no sufficient ground for reversing the finding of the trial Judge.

The appeal, in my opinion, should be dismissed.

MAGEE, J.A., concurred.

MEREDITH, J.A. (dissenting) :—The learned trial Judge, with the expressed assent of the defendants, and the tacit assent—as well as, no doubt, to the gratification—of the plaintiff, withdrew this case from the jury and determined it altogether himself, with the exception of the single question: “Were the trap-doors down and the vestibule doors closed between the car upon which the plaintiff was a passenger and the Pullman car in rear of it, when the train came to a stop at Weston?” and the assessment of damages: and so the case stands in a very different position upon this appeal from that upon which it would stand if the case had been tried in the more usual way—if the jury had been required to find, and had found, upon all the material questions of fact involved in the case.

The jury’s answer to the one question was “Yes:” and they assessed the damages at \$2,500: findings which must stand, because there was evidence adduced at the trial upon which reasonable men might so find; and there is no appeal against a jury’s finding.

But, in regard to all other material facts, there is an appeal; and this Court is bound now to consider such facts; and, if they prove to be, plus the findings of the jury, insufficient to support the judgment directed, at the trial, to be entered in the plaintiff’s favour, it cannot stand.

There is no finding of negligence on the part of the defendants, by the jury, nor indeed, expressly, by the Judge; nor, if



such negligence, that it was the proximate cause of the plaintiff's injury. The mere fact of this particular door being closed "when the train came to a stop" might be evidence of care rather than lack of care. It may be that the jury, if asked, would have found that it was not open at all during that stop. But they have not done so. The evidence of the plaintiff, and that of his companion at the time, is not very clear in regard to this: they say that they rose from their seats before the train had quite stopped, and went to the platform and found the outer doors closed; that the plaintiff's companion made an effort to open them, but could not, and that they then went on through the next car—a Pullman—reaching its rear doors and opening them and getting off when the train was again in motion: the time during which the train was actually stopped is variously put at from one minute and a half to three minutes; the plaintiff's companion testified to about a minute and a half: and so it seems difficult to account for the plaintiff's movements during that time, unless it was nearly all spent in vain efforts to open the doors, though neither testified to anything pointing to more than a few moments' stay there. If it were proper that a way out through that door should have been provided, that duty would have been performed if the doors were opened after the train stopped and kept open long enough to enable passengers using ordinary diligence and care to alight. But it may be that, if the jury were right in their finding, then those doors were not open at any time during the stop; and the evidence of the conductor, as well as that of the brakesman, respecting them, is untrue; and yet it would have been better if the question had not been limited to the time "when the train came to a stop."

Assuming, however, that the finding ought to be that no reasonable means of alighting from the train was afforded at those doors, during that stop, was there negligence on the part of the defendants in that respect?

My finding upon the whole evidence upon this question is, that there was. The defendants did not at the trial take the position that it was not their duty to passengers to provide a way out by the doors in the rear of the car in which the plain-

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tiff was; the whole of the testimony in their behalf points the other way; it was to the effect that those doors are always kept open for that purpose until that train leaves the station at which the accident occurred, and that they were so open, so that the plaintiff might and should have passed through them in alighting on the occasion in question.

Then was the neglect of the train's crew to open them, or to leave them open, the proximate cause of the plaintiff's injury? I am unable to say that it was; feeling constrained to find that the want of ordinary care on the part of his companion and himself, on the contrary, was the cause of this most regrettable accident.

Finding no way out by the rear doors, and that some of those doors were so fastened that they could not be opened, which need have been the work of a few seconds only, their course seems to me very plainly to have been, to pass through the car they had occupied, and in which they had a right to be, and find a way out at its front door; all of which might have been done more than five times over, even at the lowest estimate of the duration of a stop—a minute and a half. That car they had a right to be in and to pass through; the sleeping car they had no right to be in or to pass through under ordinary circumstances. They had not paid for passage in it; those only who had, had a right to be there; and had a further right not to be disturbed by those who had not; and especially not to be disturbed when they had retired or were retiring; only an invitation or an emergency would justify that which the plaintiff and his companion did. What excuse have they for invading that car at that hour of the night? The right to alight might justify it if that were the only reasonable way of alighting; but that is not so; the contrary is the fact; as all who travel upon our railways must know. Sleeping cars are generally if not invariably "vestibuled" as it is called; and the vestibules are more generally closed than in ordinary cars, because those travelling short distances are not in the habit of travelling in sleeping cars. The protection of those occupying sleeping cars requires vestibuled cars; and the safety which the closed vestibule affords might be converted into a trap if passengers from

any part of the train were permitted to open them, at their will or for their convenience, without the knowledge of any of the train's crew.

In addition to all this, the plaintiff and his companion saw and passed by the porter of the sleeping car in going through it, but without asking from him to be afforded means of alighting; as, I think, even if they had had a right to be there, they should have done. It was within the power of any of the train hands to stop the train and afford a means of alighting, and that should and would be done, doubtless, in a proper case; the mere pulling of a signal cord, with which all train hands are familiar, would have stopped the train.

But, having had time enough to go through their own car many times over, and, so far as the evidence shews, not having attempted to go that way at any time, but, instead, having invaded the sleeping car at almost the last moment, and opened its closed doors, and, so far as the evidence shews, properly closed doors, and got off when the train was in motion, I am quite unable to see how the plaintiff can justly recover damages from the defendants for injuries sustained through a misstep in attempting so to alight.

To say that the plaintiff was imprisoned is, of course, drawing the long bow; with one door of a sixty-foot car wide open, the imprisonment is imaginary. Nor can it be said that the defendants failed to have their train sufficiently manned; four persons to aid possibly hardly more than eight or ten persons to alight ought to be sufficient.

I am unable to see any just ground upon which the judgment in the plaintiff's favour can be supported. Whether it could have been supported if the jury had found sufficient facts to sustain a judgment, is a question which it is not necessary to consider.

*Appeal dismissed; MEREDITH, J.A., dissenting.*

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## [IN THE COURT OF APPEAL.]

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*Criminal Law—Burglary and Theft—Trial of two Prisoners together—Conviction by County Court Judge—Leave to Move for New Trial on Weight of Evidence—"Verdict" of Judge—Criminal Code, sec. 1021—Jurisdiction of Court of Appeal—New Trial Granted to one Prisoner only—Effect as to the other—Evidence—Possession of Stolen Money without Explanation.*

An application for a new trial, with the leave of the trial Judge, may be made to the Court of Appeal, under sec. 1021 of the Criminal Code, although the "verdict" is that of a Judge, and not of a jury. "Verdict" usually means the finding of a jury; but, the other words of sec. 1021 being general, an implied limitation cannot be rested upon the word "verdict" alone.

The two prisoners were tried together in a County Court Judge's Criminal Court, for burglary and theft; both were convicted; and, by leave of the Judge, they both moved for a new trial, under sec. 1021, upon the ground that the verdict or finding was against the weight of evidence:—*Held*, that the verdict against the prisoner F. was contrary to the weight of evidence, and that he should have a new trial; but not so the defendant M.

The cases of the two had to be considered separately; and it did not follow that, because the weight of evidence was in favour of one, there should be a new trial as to both.

The contention that possession of recently stolen money, without explanation, is no evidence of guilt, though it would be as to goods of any other description, is too broad. It is a question of fact, governed by all the circumstances of the case.

MOTION by the defendants, under sec. 1021 of the Criminal Code, by leave of the Junior Judge of the County Court of the County of Middlesex, before whom, in the County Court Judge's Criminal Court, the defendants were tried for burglary and theft, and both convicted, for a new trial, on the ground that the "verdict" or finding of the Judge that the defendants were guilty was against the weight of evidence.

Section 1021 of the Code is as follows:—

1021. After the conviction of any person for any indictable offence the court before which the trial takes place may, either during the sitting or afterwards, give leave to the person convicted to apply to the court of appeal for a new trial on the ground that the verdict was against the weight of evidence.

2. The court of appeal may, upon hearing such motion, direct a new trial if it thinks fit.

3. In the case of a trial before a court of general or quarter sessions such leave may be given, during or at the end of the session, by the judge or other person who presided at the trial.



September 26. The motion was heard by GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A., and LENNOX, J.

*P. H. Bartlett*, for the defendants, argued that a new trial should be granted, on the ground that there was not sufficient evidence to support the conviction. There is no evidence at all against Fairbairn; and, as regards Murray, the case against him merely rests on the presumption arising from his having been in recent possession of money for which he did not account, and which included two silver coins which were identified as having been in the rifled cash-box. If the conviction of either defendant was against the weight of evidence, both were entitled to a new trial: *Regina v. Fellowes* (1859), 19 U.C.R. 48, at p. 54, *per* Robinson, C.J. He also referred to *Rex v. Isaacs* (1813), MS. Bayley, J., cited in Russell on Crimes, 7th ed., vol. 1, p. 348; *Regina v. Saunders*, [1899] 1 Q.B. 490; Wills on Circumstantial Evidence, 6th ed., p. 99.

*J. R. Cartwright*, K.C., for the Crown, argued that the case against Murray was perfectly clear, on his possession of the marked coins, and of an amount so nearly corresponding with the stolen money, without any explanation being given. Fairbairn's case is different, but the circumstances of his connection with Murray are very suspicious. Evidently they were old "pals," and did not meet for the first time in the London Public Library.

*Bartlett*, in reply.

November 19. MACLAREN, J.A.:—The two appellants were tried together in the County Court Judge's Criminal Court at London, before the Junior Judge, for burglary and theft, and were both convicted. He granted them leave, under sec. 1021 of the Criminal Code, to appeal to this Court for a new trial, on the ground that the verdict was against the weight of evidence.

It was strongly argued on their behalf before us that, if the conviction of either of the accused was against the weight of evidence, they should both have a new trial, and a dictum of Robinson, C.J., in *Regina v. Fellowes*, 19 U.C.R. 48, at p. 54, was cited in support of this proposition. It is to be observed,

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however, that that was a case of conspiracy, as was also *Regina v. Gompertz* (1846), 9 Q.B. 824, 842, where Lord Denman, C.J., laid down the same rule. No authority was cited to us, nor have I found any, for such a rule in a case like the present. If this had been a case of conspiracy, it would have necessarily been applicable to them both. In my opinion, the general rule is that laid down by Lord Kenyon, C.J., in *Rex v. Mawbey* (1796) (also a case of conspiracy), 6 T.R. 619, at p. 638, where he says that the Courts will grant or refuse a new trial according as it will tend to the advancement of justice. I do not find anything in the law or in the facts of the present case to prevent the cases of these two appellants being considered separately, each on its own merits, and, if the evidence warrants it, different conclusions being arrived at.

According to the evidence, the Arva mill, a short distance north of London, was broken into on the night of the 27th March, 1912, the safe blown open, and two small cheques and \$178.15 in cash stolen. The empty cash-box was found in a field close to the road leading to London. Fairbairn gave evidence and said he was a peddler who had sold out his stock in Sarnia and Watford, and had beaten his way to London on a freight train, arriving on Monday the 26th March, and that he slept in a barn in London West on Tuesday night, got two cups of tea at the house of the owner about nine on Wednesday morning, having his own bread; that he met Murray for the first time in the public library; and that they were drinking in different hotels. When arrested on Wednesday afternoon, he had \$3.86 on his person. His story about his breakfast was corroborated, and he was seen, about nine o'clock, on his way to the city alone. The two prisoners were seen together several times during the day at hotels, a barber shop, etc. At one of the hotels, Fairbairn put his hand into Murray's pocket and took out \$115 in bills, which were taken from him and delivered to the landlady for safe keeping. When arrested late in the afternoon, Murray had \$17 additional in bills and \$22.42 in silver and coppers. When on his way to the police station, he said several times that he had \$18 when he came to London, but

he was in a drunken condition when he said it. The denominations of the bills and the silver corresponded generally with that taken from the cash-box, but none of it was identified except two silver coins—a ten cent piece worn smooth with a very small hole near the edge, and an English threepenny piece, both of which had lain in the mill cash-box for some weeks. Murray did not go into the witness-box nor produce any evidence as to where he had come from or where he had got those two coins or any of the money; and there was no evidence of his having even been in London until the day after the robbery. In my opinion, he has made out no case for a new trial; and I think his appeal ought to be dismissed.

As to Fairbairn, there is no evidence that the \$3.86 found on him formed part of the money stolen, nor is there any evidence that he had ever seen Murray until the afternoon of the day after the burglary. It is difficult to accept his story as to his doings on the day in question, as a considerable part of it is inconsistent with the evidence of the other witnesses, but that may be due in part to the drunken condition in which he then was. He appears to have suffered a prejudice from his familiarity with Murray during the day after the burglary. No special reasons have been given for the granting of the leave to appeal, but it is probably on account of the weakness of the evidence against Fairbairn.

On the whole, I am of opinion that a new trial should be granted to Fairbairn alone.

I am aware that in entertaining the appeal in this case we are giving to the word "verdict" in sec. 1021 of the Code a meaning that it does not usually bear. While the general dictionaries, both English and American, mention its use in the popular or philological sense, as when one speaks of a "verdict of the people," yet they all, so far as I have seen, confine its legal meaning to the findings of a jury. The same may be said of the English law dictionaries, and also of the American, so far as I know, except that of Rapalje and Lawrence, which defines it as "the opinion of a jury or of a Judge sitting as a jury on a question of fact." This last definition has been approved

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in *Carlyle Water Light and Power Co. v. City of Carlyle* (1889), 31 Ill. App. 325, 338. On the other hand, some of the American law dictionaries not only define the word as the finding of a jury, but add that it is inapplicable to the finding of a judge. Black's Law Dictionary says, "It never means the decision of a court or a referee or a commissioner;" and Abbott's says, "The decision of a judge or referee, upon an issue of fact, is not called a verdict, but a finding, or a finding of fact." In *Bearce v. Bowker* (1874), 115 Mass. 129, Gray, C.J., says, "None but a jury can render a verdict." Similar language is used in *Otis v. Spencer* (1853), 8 How. Pr. (N.Y.) 171; *Kerner v. Petigo* (1881), 25 Kan. 652; *McCullagh v. Allen* (1872), 10 Kan. 150; and *Froman v. Patterson* (1890), 24 Pac. Repr. 692.

I do not know of any English statute in which the word has any other meaning than the finding of a jury, nor any Canadian statute where it can be otherwise construed, unless it be in this section, 1021, of the Code which we are now considering. Nor am I aware of its being used in any other sense by any English or Canadian Judge or legal writer except by the Master of the Rolls (Jessel) in *Krehl v. Burrell* (1878), 10 Ch.D. 420, where, in a civil case tried by him without a jury, he says: "I give a verdict for the plaintiff, and reserve my judgment for a fortnight." This was said thirty-five years ago, but such use of the word does not appear to have been followed unless it be in the section which we are now construing (possibly because Jessel was more distinguished for his legal acumen than for his exact scholarship). It would have been much more satisfactory if Parliament had used unambiguous words that could not have given rise to the present difficulty. A further argument in favour of confining it to the verdict of a jury might be that in a case in which the Judge had sufficient doubts to justify him in allowing an appeal, he would ordinarily give the benefit of the doubt to the accused and not convict him. However, as this point was not taken by the Crown, we do not now pass upon it, but reserve the right to do so hereafter in case Parliament should not see fit to change the language of the section and it should come before us for decision.



MEREDITH, J.A.:—Mr. Bartlett's contention that possession of recently stolen money, without explanation, is no evidence of guilt, though it would be as to goods of any other description, is quite too broad a contention. There may, and generally must, be a great difference in fact between the possession of current coin of the realm, and money of a like character, and possession of, for instance, a horse, or a man's pocket-book with his name upon it. But there may be cases of the possession of money under circumstances which could not but make such possession conclusive, in fact, of guilt, to the mind of ordinary knowledge and intelligence; as also there might be such possession under circumstances which might and should in like manner exclude even any serious suspicion of guilt.

It is all a question of fact, governed by all the circumstances of the case; circumstantial evidence, weighty or without weight according to the surrounding circumstances.

The possession of the money by Murray on the morning after the mill was broken into, and money, very like that which was found upon his person, stolen, in connection with the other circumstances of the case, and wholly unexplained by him, made a very strong case against him. Having regard to the similarity in amount, the number of "coppers," the threepenny bit, and the other similarities, it is rather difficult to understand how the trial Judge could very well have come to any other conclusion than that the money found in this prisoner's possession was the money stolen from the mill; or how, even with the mind filled with knowledge of the freedom of the interchange of money from one to another in a lawful manner, without observation, by the taker, of more than the amount and the genuineness of the money, if that much observation, this prisoner could have come by it otherwise than by having broken into the mill and stolen it.

At all events it is impossible for me to consider that the finding of guilt of this man was against the weight of the evidence adduced.

In regard to the other prisoner the case is quite different. None of the stolen money was proved to have been in his possession; and, if they were "partners in the job," the division of

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profits was a most uneven one: one would have expected him to have been in possession of a fair share of the spoils.

But the case made against him was one quite sufficient to arouse grave suspicion, if nothing more, of his complicity in the crime; perhaps it was enough to require the jury to pass upon the question of his guilt or innocence if the case had been tried by a jury. However, the question we have now to consider is, not whether there was any evidence upon which a jury might properly have convicted, but is, whether the finding of guilt is against the weight of evidence.

The learned Judge who tried the case must, I think, have had some doubt upon this question: and that was, in my opinion, well founded. It is much against the weight of the evidence adduced at the trial. This prisoner ought, in my judgment, to have a new trial on this ground.

This application was made under sec. 1021 of the Criminal Code, with the leave of the trial Judge; and, although it was firmly opposed, on the part of the Crown, on the merits, no objection was made that this section is applicable to a jury trial only. During the argument I suggested that it might not be applicable to a trial by a Judge; and, if so, this Court would have no jurisdiction to make any order. But further consideration has convinced me that it is. The words are very general: "After the conviction of any person for any offence the Court before which the trial takes place" may give leave to apply to this Court for a new trial on the ground that the verdict was against the weight of evidence. There is certainly no expressed limitation of the power to jury cases; and to rest an implied limitation upon the word "verdict" alone would seem to me to be resting it upon a very frail foundation.

I am not prepared to say that it would be altogether inaccurate to describe the finding of "guilty" or "not guilty," and its endorsement upon any record, of a Judge having the power of and acting in the capacity of a jury, in a criminal case, as a "verdict." It would certainly be more convenient if the same thing should be called by the same name, even though done by different bodies, qualifying it wherever necessary by a word indicative of the body whose verdict it was. My impression is

that most people would be astonished if they were told that the word "verdict" was misapplied when applied to anything but a finding of a jury; and, referring to their dictionaries, would find there, among other definitions, to justify such surprise, the meanings, "a decision," "opinion pronounced."

Something more real than mere literal accuracy, however, lies in the fact that, unless the section applies to findings of Court, Judge, and Magistrate, as well as of jury, there would be a right to apply for a new trial in jury cases, but none in any other under this section; and, as neither Judges nor Justices are infallible, any more than juries, the provision would seem to create an anomaly, and one which would require consideration before any one elected trial without a jury.

If the Act had provided for any appeal against the finding of Court, Judge, or Magistrate in indictable cases, upon questions of fact, the case would be different; but it does not; it, as I think, puts them all on the same footing with the findings of juries in regard to new trials.

I am unable to see anything in Mr. Bartlett's contention that, if either prisoner is entitled to a new trial, both must be. The case is one in which one may be guilty and the other innocent; one in which there might have been a separate trial of each; and it is one in which the "verdict" found and recorded against the one is contrary to the weight of the evidence, whilst that found and recorded against the other is not.

I would dismiss the application of the prisoner Murray; and grant that of the other applicant.

GARROW and MAGEE, JJ.A., and LENNOX, J., concurred.

*Judgment accordingly.*

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## RICHARDS v. COLLINS.

*Assessment and Taxes—Tax Sale—Indian Lands—Indian Act, R.S.C. 1906, ch. 81, secs. 58, 59, 60—Action to Set aside Sale and Deed—Statutory Time-limit—Application of—Action of Superintendent General—R.S.O. 1897, ch. 224, sec. 209—Essential Preliminaries to Validity of Sale not Observed—Right to Attack after Expiration of two Years—Locus Standi of Plaintiffs—Lien of Purchaser for Improvements and Money Expended—Assessment Act, 4 Edw. VII. ch. 23, sec. 176 (1)—Non-retroactivity—Adoption of Statutory Rule notwithstanding—“He who Seeks Equity must Do Equity”—Right to Possession — Condition — Costs—Notice—Evidence—Sec. 181 of Act of 1904.*

The provisions of secs 58, 59, and 60 of the Indian Act, R.S.C. 1906, ch. 81, are to be read as applicable to a case where the Superintendent General of Indian Affairs has actively intervened as between the tax purchaser and the original purchaser of Indian lands. Where the Superintendent General has considered a tax deed and approved of it as a valid transfer, his ruling may be questioned by an action, which must be brought within two years after the date of the tax deed. But there is no such limit of time, so far as the Indian Act is concerned, in attacking an illegal tax sale and deed, if no action by way of approval has been taken by the Superintendent General; and, where that is the case, the general law of the Province as to tax sales applies.

The statutory protection of sec. 209 of R.S.O. 1897, ch. 224—the Assessment Act in force at the time of the tax sale and tax deed in question in this action (1901-02)—does not avail, if there has been no legal impost of taxes, and if these, though legally imposed, have not been in arrear for three years next preceding the furnishing of the list of lands liable to be sold under sec. 152 of the Act, and if there has been no such list furnished at all.

And *held*, upon the evidence, that each one of these necessary preliminaries was absent in regard to the sale for taxes of unpatented Indian lands and the deed made pursuant to the sale, attacked in an action brought after the expiry of two years from the date of the deed; and the sale and deed should be set aside.

*Held*, also, that the plaintiffs had a sufficient *locus standi* to seek the intervention of the Court.

*Held*, also, that the defendant, the purchaser at the tax sale, under the particular frame of this action was entitled to a lien upon the lands for improvements and for money expended for taxes and statute labour; but not under the Assessment Act of 1904, 4 Edw. VII. ch. 23, sec. 176 (1), as that Act did not come into force till the 1st January, 1905, and was not retroactive; nor under the Assessment Act in force when the rights of the plaintiffs accrued, R.S.O. 1897, ch. 224, sec. 212, for that applied only when the sale was invalid by reason of uncertain and insufficient designation or description; the statute R.S.O. 1897, ch. 119, sec. 30, under which the relief is more restricted than under the Act of 1904, might be applied; but the Court was entitled to go beyond that in aid of the defendant; the plaintiffs, having come into a Court of Equity and obtained equitable relief—a declaration and adjudication that the sale and deed were invalid and should be set aside—must do equity; and the Court might well adopt as equitable the statutory rule laid down in sec. 176 (1) of the Assessment Act, 1904.

*Held*, also, that the plaintiffs were entitled to judgment for possession of the lands, not, however, to be made effective until the expiration of one month nor until the plaintiffs had paid into Court the amount for



which the defendant was declared to have a lien: Assessment Act, 1904, sec. 176 (2), first clause.

*Held*, also, that the prerequisite for the application of sec. 217 (1), (2), of R.S.O. 1897, ch. 224 (sec. 181 of the Act of 1904), is that, at the trial, it must be found that a certain notice was not given; and, as it was not so found and there was no evidence upon which it could be so found, the section did not apply; and, at any rate, awarding the costs of the action to the plaintiffs was a sufficient compliance with the section, without awarding also the costs of a reference, which were left to be disposed of by the Master.

Judgment of BOYD, C., affirmed.

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ACTION to recover possession of land and to set aside a tax sale. Counterclaim by the defendant for money expended in taxes, statute labour, and improvements.

The action was tried before BOYD, C., without a jury, at Gore Bay.

*F. E. Titus*, for the plaintiffs.

*R. R. McKessock*, K.C., for the defendant.

June 22. BOYD, C.:—An objection not on the pleadings was raised *ore tenus*, that, by reason of some provisions of the Dominion Indian Act, this action was not well-founded.

The Indian Act, as found in R.S.C. 1886, ch. 43, sec. 43, was amended in 1888 by 51 Viet. ch. 22, sec. 2, now found in the revision of 1906 as ch. 81, secs. 58, 59, and 60, and brings in an entirely new provision as to dealing with Indian lands which have been sold for taxes. The substance of this new legislation appears to be, that, when a conveyance has been made by the proper municipal officer of the Province, purporting to be based upon a sale for taxes, the Superintendent General may “approve of such deed or conveyance, and act upon and treat it as a valid transfer” of the interest of the original purchaser (sec. 58 (1)).

When the Superintendent General has “signified his approval of such deed or conveyance by endorsement thereon,” the grantee shall be substituted (in all respects, in relation to the land) for the original purchaser (sec. 58 (2)).

The Superintendent General may cause a patent to be issued to the grantee named in such conveyance, on the completion of the original conditions of sale, unless such conveyance is declared invalid by a Court of competent jurisdiction, in a suit by some person interested in such land, within two years after the date

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of the sale for taxes, and unless within such delay notice of such contestation has been given to the Superintendent General (sec. 59).

These provisions are, I think, to be read as applicable to a case where the Superintendent General has actively intervened as between the tax purchaser and the original purchaser: where the Superintendent General has taken under consideration the tax deed and has approved of it as a valid transfer, by endorsement thereon. This *primâ facie* ruling of his may be brought into question and disputed in the Court by suit brought within two years after the date of the tax deed. But, in my view of these sections, there is no such limit of time in attacking an illegal tax sale and deed, if (as in this case) no action in respect of the tax deed by way of approval has been taken by the Superintendent General. If the Superintendent General remains silent and inactive, there is no restriction as to time placed upon the right of the original purchaser to claim the assistance of the Courts, so far as the Indian Act is concerned. He may otherwise lose his legal status by delay and adverse possession; but in this case no such barrier exists.

This case rests under the general law as to tax sales then in force, namely, that, where lands are sold for arrears of taxes, and the treasurer has given a deed for the same, that deed shall be to all intents and purposes valid and binding, if the same has not been questioned before some Court of competent jurisdiction, by some person interested, within two years from the time of sale: sec. 209, R.S.O. 1897, ch. 224.

This statutory protection does not avail if there has been no legal impost of taxes, and if these, though legally imposed, have not been in arrear for three years next preceding the furnishing of the list of lands liable to be sold under sec. 152 of the Assessment Act, and if there has been no such list furnished at all. Each one of these necessary preliminaries appears to be absent in the case in hand, as may now be briefly noted.

The action relates to certain conflicting claims made to the possession of an interest in land situate in the district of Manitoulin, part of an Indian Reserve, and as such subject to the

control of the Department of Indian Affairs for the Dominion of Canada. Lot 21 in the 12th concession of the township of Howland, in that district, containing 147 acres, was sold in June, 1869, to Thomas F. Richards, and a certificate of sale was duly issued. This land was so dealt with that a patent from the Crown was issued for the westerly 100 acres, in 1879, to Jane Mackie, and that part is not in controversy. The easterly 47 acres was assigned in 1876 to David Richards by his son Thomas, and that assignment was duly registered in the Indian Department, and that part still stands in the name of David Richards, and has not been patented.

David Richards died in February, 1890, leaving a will by which he left all of his belongings to his wife to hold for her life. He gave her power to sell a part or all of the real estate and personal, and declared that at her death what remained was to be equally divided between his sons Thomas and Luther. These two are the plaintiffs, and I see no reason to question that they take directly through their father. I do not give effect, therefore, to the contention that the widow made a valid disposition of the 47 acres by will so as to give a life estate to her second husband, Moore, and a remainder to the plaintiffs.

The disability of the original purchaser to hold or to transfer on the ground of infancy is raised by the pleadings. It appears that he was born in 1854, and he was of age in 1875, when he assigned to his father, and that assignment had been recognised and acted on by the Indian Department, and I think any controversy as to his status will have to be decided by that Department if and when he applies for a patent. He has sufficient *locus standi*, with his brother, to seek the intervention of this Court.

The intervention is sought in respect of a tax sale held in 1901, and a certificate of purchase obtained by the defendant. That certificate sets out that a sale was had on the 4th September, 1901, of the right, title, and interest of the owner in the patented lot, being lot 21 in the 12th concession of Howland, containing 48 acres more or less, and that Collins became the purchaser for the sum of \$8.65.

That sum was directed to be levied by warrant of the Reeve,

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dated the 27th May, 1901, of which \$7.85 was for arrears of taxes alleged to be due up to the 31st December, 1900.

On this state of facts, the tax deed was executed by the proper officers of the township on the 17th September, 1902, and has been duly registered upon the land and in the Indian Department. By this deed, the defendant claims, he has cut out any right of the plaintiffs to the land, and is alone entitled to claim a patent from the Indian Department. The validity of the tax sale is, therefore, the main issue in this litigation.

Evidence is given as to the taxes for the years 1897, 1898, and 1899, which appear to form the aggregate of the arrears alleged to be sufficient to support the sale. But I have seldom seen a case where the evidence was so limping and unsatisfactory, and where so many flagrant mistakes and omissions are manifest in all the proceedings.

The radical error appears to be this: that the 100 acres patented, being the westerly part of the whole lot, was treated as being lot 21 in the 12th concession of Howland, and all the taxes on that part have been duly paid. The officers appear to have assessed the easterly 47 acres of lot 21 in the 13th concession of Howland as an entirely different lot in another concession, which concession has no existence. Among other mishaps, the assessment rolls of 1898 have been lost; but, on production of the assessment rolls of 1897 and 1899, it clearly appears that lot 21 in the 13th concession is assessed as belonging to Richards and as containing 48 acres. I cannot suppose that this mistake was remedied in the missing roll of 1898, though some reliance is placed upon the collector's roll of 1898 as shewing taxes of \$2.47 on 48 acres, concession 12, lot 21, owned by Thomas Richards; yet it does not seem to be clear that this is not the roll of 1899. But, even if the roll of 1898, Richards was not notified of the tax till the 10th October, 1898, which would be less than three years before the sale in September, 1901. Besides, by the tax deed the sale purports to be for arrears alleged to be due up to the 31st December, 1900. Upon the evidence, I can find no valid assessment of the land intended to be sold for the year 1897 or 1899, and I much doubt the validity of that in 1898.

The lands were assessed as "resident," and no list of lands



containing these as liable to be sold for taxes was furnished by the treasurer; this statutory warning, which is an indispensable prerequisite to a valid sale, was not in this case given (sec. 152).

What was substituted is frankly told by the treasurer: "The clerk and I found that this lot had been missed in being assessed, and we went back three years and computed the taxes; I do not remember notifying anybody; they would see it when it was advertised. I had no authority to fix the amount in this way."

This summary ascertainment of what ought to have been assessed from year to year appears to be the only foundation upon which this land was confiscated by enforced sale for taxes. Apart from all other objections (which need not be further discussed), those I have mentioned are fatal to the validity of the tax sale, which has to be vacated upon proper terms.

The defendant has counterclaimed for his outlay in taxes, statute labour, and improvements by way of clearing and fencing in the lands. These should be ascertained and declared to be a lien on the land, and against this should be set off any profit derived from the land or which could reasonably have been derived from it by the purchaser.

The plaintiffs should get the costs of action and the defendant the costs of counterclaim, to be set off. The amount of the lien to be ascertained by the Master if the parties cannot agree, and he will say how the costs in his office of the reference should go.

The defendant appealed from the judgment of BOYD, C.; and the plaintiffs cross-appealed.

November 12. The appeal was heard by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., RIDDELL and LENNOX, JJ.

*A. G. Murray*, for the defendant, argued that the trial Judge should have held that, the lands in question being unpatented Indian lands, the Court had no jurisdiction to entertain the action; that under the provisions of sec. 59 of the Indian Act, R.S.C. 1906, ch. 81, the Court had no jurisdiction to entertain an action to set aside a tax sale of unpatented Indian lands after the expiration of two years from the date of such sale. The judgment infringed upon the jurisdiction of the Superin-

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tendent General of Indian Affairs to declare such tax sale valid or invalid, under the provisions of sec. 58 of the Indian Act and the Indian Land Regulations, and was in conflict with the power conferred upon the Superintendent General to cause a patent of the lands to be issued to the tax purchaser after the expiration of two years from the date of such tax sale, upon the conditions set forth in sec. 59 of the Act.

THE COURT dismissed the defendant's appeal.

*F. E. Titus*, for the plaintiffs, in support of the cross-appeal, contended that the judgment should contain an order for possession. He also objected that the judgment should not have left the costs of the reference in the discretion of the Master, referring to R.S.O. 1897, ch. 224, sec. 217 (1), (2). He also complained of the defendant having been awarded the costs of his counterclaim, saying that the judgment had been wrongly based upon the Assessment Act of 1904, 4 Edw. VII. ch. 23, sec. 176 (1), which did not come into force until the 1st January, 1905. This statute was not retrospective; and the present case was governed by R.S.O. 1897, ch. 224, sec. 217. This was not a question of procedure merely, but of substantive right. On the question of the Act of 1904 not being retrospective, he referred to Maxwell on the Interpretation of Statutes, 5th ed., p. 348. He also referred to *Carter v. Hunter* (1907), 13 O.L.R. 310, at p. 318; *McKay v. Chrysler* (1879), 3 S.C.R. 436, at pp. 472, 473, 476, and 481; and *Hislop v. Joss* (1901), 3 O.L.R. 281.

*Murray*, in answer to the argument on the cross-appeal, contended that the Act of 1904 was retrospective and did apply, and that the question here was one of procedure, and not of substantive right. He urged that the maxim "He who seeks equity must do equity" applied here, and he referred to *Paul v. Ferguson* (1868), 14 Gr. 230; Maxwell on the Interpretation of Statutes, 5th ed., p. 357; *Campbell v. Fox* (1867), 17 C.P. 542; and *Doe d. Earl of Mountcashel v. Grover* (1847), 4 U.C.R. 23.

*Titus*, in reply.

November 20. RIDDELL, J.:—This is an appeal from the judgment of the Chancellor; the plaintiffs also cross-appealing. Upon

the argument, we dismissed the defendant's appeal, entirely agreeing with the Chancellor's view of the law.

The plaintiffs cross-appeal as follows:—

The defendant counterclaimed for \$400 for improvements and for money expended for taxes and statute labour, for an account to be taken of the same, and for an order declaring a lien on the lands for such amount as might be found due. The formal judgment declared that the defendant "is entitled to . . . a lien upon the lands . . . for the amount of the purchase-money paid by him . . . and interest . . . and for taxes and statute labour paid or performed by him and for the value of any improvements made by the defendant upon the said lands . . . before this action was commenced, and for the costs of his counterclaim . . . after deducting . . . the rents and profits received . . . or which might have been received . . ." And it is referred to the Master at North Bay to determine the amount, leaving the costs of the reference in the discretion of the Master. The plaintiffs contend that this is not justified by the law.

The judgment is said to be based on the Act of 1904, 4 Edw. VII. ch. 23, sec. 176 (1), considered in *Sutherland v. Sutherland* (1912), 3 O.W.N. 1368; but this Act did not come into force till the 1st January, 1905: see sec. 229. And this is not a mere matter of procedure or practice, but of substantive rights: I, therefore, think the statute is not retroactive.

We must see how the law stood when the rights of the plaintiffs accrued, which may, for the purposes of this action, be considered as 1901 or 1902, at any rate before January, 1905. The statute then in force was R.S.O. 1897, ch. 224, sec. 212; but that applies only when the sale "is invalid by reason of uncertain and insufficient designation or description"—which is not the case here. We may, however, apply the statute R.S.O. 1897, ch. 119, sec. 30, if necessary. This comes from (1873) 36 Viet. ch. 22, sec. 1: "In every case in which any person has made, or may make, lasting improvements on any land under the belief that the land was his own, he or his assigns shall be entitled to a lien upon

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the same to the extent of the amount by which the value of such land is enhanced by such improvement.”

This statute very much extends the application of the principle of remuneration by the true owner of the land to one who under a mistake of title has made permanent improvements upon it—the former Act going as far back as 1819, 59 Geo. III. ch. 14, by sec. 3 providing for the case of mistake in boundaries occasioned by unskilful surveys, which were by no means uncommon in those days of dense forest, deep morasses and cheap whisky. This statute is in substance repeated as R.S.O. 1897, ch. 119, sec. 31.

The relief granted by sec. 30, however, is much more restricted than that given by the Act of 1904. But, I think, in the present instance, we are entitled to go beyond sec. 30 in aid of the defendant.

It is a well-recognised principle of equity that “he who seeks equity must do equity.” In many instances this contains a pun on the word “equity” and means nothing more than that, “he who seeks the assistance of a Court of Equity must in the matter in which he so asks assistance do what is just as a term of receiving such assistance.” “Equity” means “Chancery” in one instance and “right” or “fair dealing” in the other.

Accordingly, while a plaintiff asserting a legal right in a common law Court would receive justice according to the common law, however harsh or unjust the law might be—yet, if he required the assistance of the Court of Chancery to obtain his rights according to the common law, he would—or might—not be assisted unless he did what was just in the matter toward the defendant.

This case was represented, on the argument, as a simple case of ejectment—and it might well have been framed as a simple action in ejectment. Had it been such, I think we should have had great, if not insuperable, difficulty in giving the defendant any relief beyond what the statute, sec. 30, gives him—and that is why one of us said on the argument that, had he been solicitor for the plaintiff, he would have brought the action in that way. There could on the facts have been no defence at law, the deed under which the defendant claims being void at law as well as in equity.



The action, however, is not a simple ejectment, as it might have been. The statement of claim sets out the facts as in ejectment indeed, but in the prayer, in addition to possession, etc., a claim is made for: "5. Such further relief as the nature of the case may require." This is ambiguous, and might mean only relief as at common law or it might mean equitable relief. We accordingly look at the judgment the plaintiffs have taken out and are insisting upon holding. Clause 2 of the judgment declares "that the sale for taxes . . . and the deed . . . made to the said defendant . . . are and each of them is invalid, and that the same should be set aside and vacated, and doth order and adjudge the same accordingly." No appeal is taken by the plaintiffs against this clause; but, on the contrary, they attend to support it in this Court. This relief, which the plaintiffs asked for and received, could not have been granted by a common law Court, but the plaintiffs must have come into Equity for it.

They cannot now be allowed to change their position: and they have come into a Court of Equity for equitable relief not grantable in a common law Court.

They must, therefore, do equity. *Paul v. Ferguson*, 14 Gr. 230, is directly in point. The head-note reads: "Where the Court is called upon to set aside a tax sale which is equally void at law and in equity, the Court does so, if at all, only on such terms as are equitable." At p. 232 the Chancellor (Van Koughnet), speaking of putting the machinery of the Court in motion to aid a hard legal right, says that in certain cases this will not be done, and continues thus: "And when the Court, in its discretion, does interfere, it does so only on such terms as it deems equitable . . . The Court says . . . 'You need not have come here at all. The deed is void at law and here, and cannot be enforced against you in any tribunal; but, if you wish for your own purposes to have your title cleared of the cloud which this deed casts upon it, we will aid you only on terms.' " It is not at all necessary to cite other cases to establish the principle—but, if desired, the many cases may be looked at referred to in Story's Equity Jurisprudence, 2nd Eng. ed., p. 64 (e); Snell, 16th ed., p. 14 (6); Josiah W. Smith's Manual of Equity Jurisprudence, 14th ed., p. 30 (IX.); and notes in the several works.

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What is equitable in this case? fair play? justice? I can find nothing inequitable, but, on the contrary, what is wholly equitable, in the statutory rule laid down in 1904. The Legislature, in definite and unmistakable terms, have said what they thought was fair. With that commendable tenderness for vested rights which characterises a responsible and representative Parliament, they have refrained from making the statute retrospective—but there is no reason why the Court, untrammelled by authority, should not adopt the statutory rule as its own. I think, therefore, this ground of appeal without merit.

It is also complained of by the plaintiffs that the judgment contains no order for possession. That is the fault of the plaintiffs themselves, so far as appears; they take out an order and judgment which should be such as satisfies them. If there be any omission, *e.g.*, if the trial Judge has not passed upon any matter which it is thought should be passed upon, the matter should be brought to his attention before being made a ground of appeal. There can be no objection to the judgment containing an order for possession, not, however, to be made effective “until the expiration of one month thereafter nor until the plaintiff has paid into Court for the defendant the amount” for which the defendant is declared to have a lien: 4 Edw. VII. ch. 23, sec. 176 (2), first clause.

It is also objected that the judgment should not have left the costs of the reference in the discretion of the Master; and R.S.O. 1897, ch. 224, sec. 217 (1), (2), is cited in support of that proposition.

This section was repealed as of the 1st January, 1905, by 4 Edw. VII. ch. 23, sec. 228, schedule M, first item. What is provided for in this sec. 217 (1), (2), is practice and procedure, and not substantive right—and, accordingly, the section must go; but it is found repeated in the new Act, sec. 181. Sub-section 2 provides that “if on the trial it is found that such notice” [*i.e.*, a notice which the defendant is by sub-sec. 1 authorised to give “at the time of appearing”] “was not given as aforesaid, or” (adding other cases) “the Judge shall not certify, and the defendant shall not be entitled to the costs of the defence, but shall pay costs to the plaintiff . . .”

The prerequisite for the application of this section is that on the trial it must be found that such notice was not given. The Chancellor did not so find; he was not asked so to find; there was no scrap of evidence offered upon which he could so find. The plaintiffs claiming some right following such a finding, the onus was upon them to establish the fact, and they failed to do so. *De non apparentibus et de non existentibus eadem est ratio*. It is of no avail for counsel to tell us on the argument that no such notice was served—that is not evidence, and we do not even have an affidavit of the fact, if it is one.

In any event, the plaintiffs have been awarded the costs of the action—the statute does not compel the Court to award all costs, of reference, etc., to the plaintiff—the word used is “costs.” The defendant is literally ordered to (I use the words of the statute) “pay costs to the plaintiff”—and, in my view, awarding the costs of the action to the plaintiffs, as has been done, sufficiently complies with the statute without awarding also the costs of a reference which it is possible may be caused or rendered necessary by the unreasonable demands or conduct of the plaintiffs themselves.

Both the appeal and (with the trifling modification spoken of) the cross-appeal fail; both must be dismissed. And, as success has been divided, there should be no costs of the appeal or cross-appeal.

Of course, we express no opinion as to the effect (if any) of any action by the Superintendent General under the provisions of the Indian Act, R.S.C. 1906, ch. 81.

FALCONBRIDGE, C.J., and LENNOX, J., agreed in the result.

*Appeal and cross-appeal dismissed without costs.*

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## [IN CHAMBERS.]

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J. J. GIBBONS LIMITED V. BERLINER GRAMAPHONE CO. LIMITED.

Nov. 22.

*Writ of Summons—Service out of the Jurisdiction—Con. Rule 162 (e), (h)  
—Contract—Place of Payment or Performance—Assets in Ontario—  
Debts Owing to Defendant—Resort to Domicile of Defendant—Discretion—  
Convenient Forum—Stay of Proceedings.*

The action was founded upon an oral agreement made in the Province of Quebec, subsequently confirmed by the plaintiff company by a letter written in Ontario, where its place of business was, to the defendant company at its place of business in Quebec. According to the law of Quebec, if no place of payment is expressly or impliedly indicated by the contract—and here there was none—payment must be made at the domicile of the debtor:—

*Held*, upon an application to set aside an order for service in Quebec of the writ of summons in an action brought in Ontario to enforce payment, that payment under the contract was to be made in Quebec; it was not enough that payment might well be made or the contract be performed within Ontario; and the case did not fall within clause (e) of Con. Rule 162.

Service of the writ might properly be allowed under clause (h), for the defendant company had assets in Ontario, of the value of more than \$200, which might be rendered liable to the satisfaction of the judgment—although the assets shewn were merely debts, which could not be reached by ordinary execution.

*Kemerer v. Watterson* (1910), 20 O.L.R. 451, followed.

The normal course is, however, to require resort to the domicile of the defendant, particularly in the case of contracts entered into at the domicile and to be there performed.

*Sirdar Gurdial Singh v. Rajah of Faridkote*, [1894] A.C. 670, followed.

The jurisdiction of the Ontario Court to entertain an action where the writ is served abroad is to be determined by the Court upon the terms of Con. Rule 162; but the Court has a discretion; and in this case, where the defendant was resident in Quebec, the Quebec Court was a convenient forum, the contract was made in Quebec and was to be interpreted according to the laws of Quebec, the defendant's assets were all substantially within that Province, and the Ontario Court acquired jurisdiction only by the accident of residence within Ontario of a debtor of the defendant, it was a sound exercise of discretion to say that the plaintiff should be compelled to resort to the Quebec forum; and an order was made staying all proceedings in this action, upon the service made in Quebec, until after the conclusion of any action which the plaintiff might bring in that Province.

Review of the recent English cases.

AN appeal by the defendant company from an order made by Mr. George S. Holmsted, K.C., Senior Registrar of the High Court, sitting for the Master in Chambers, on the 11th November, 1912, dismissing an application by the defendant company to set aside an order made by the Master in Chambers on the 20th September, 1912, permitting the issue and service of a writ of summons out of Ontario.



November 19 The appeal was heard by MIDDLETON, J., in Chambers.

*R. C. H. Cassels*, for the defendant company.

*J. F. Boland*, for the plaintiff company.

November 22. MIDDLETON, J.:—The appellant contends not only that the case is not one falling within the provisions of Con. Rule 162, but that, in the exercise of a sound discretion, the plaintiff ought not to be permitted to sue within Ontario.

The plaintiff seeks to bring this action within the terms of clause (e) and of clause (h) of Con. Rule 162.\* It is said that the action is founded on a breach within Ontario of a contract which is to be performed within Ontario; and, in the second place, it is said that the defendant has assets within Ontario, of the value of more than \$200, which may be rendered liable to the satisfaction of the judgment.

The action is founded upon a verbal agreement made in Montreal, subsequently confirmed by writing. The plaintiff's letter of the 6th June states: "We hereby confirm your verbal agreement with our Mr. Tedman." This verbal agreement was made in Montreal.

According to the law of Quebec, if no place of payment is expressly or impliedly indicated by the contract, payment must be made at the domicile of the debtor. There was no term, express or implied, for payment elsewhere; and payments under this contract are, therefore, to be made in Montreal.

It is not enough that payment or performance of the contract might be well made within Ontario. The Rule, as it now stands, does not differ widely in meaning from the former Rule, which

\*162 (1) Service out of Ontario of a writ . . . may be allowed by the Court or a Judge wherever:—

(e) The action is founded on a breach within Ontario of a contract, wherever made, which is to be performed within Ontario, or on a tort committed therein;

(h) Service may also be allowed where the action is for any other matter and it appears to the satisfaction of the Court or a Judge that the plaintiff has a good cause of action against the defendant upon a contract or judgment, and that the defendant has assets in Ontario, of the value of \$200 at least, which may be rendered liable for the satisfaction of the judgment.

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contained the words "according to its terms." These words were probably omitted so as to make the Rule apply to implied as well as express terms of contracts. The theory of the Rule is, that the stipulation requiring performance within the jurisdiction amounts to an attornment to the local jurisdiction of our Court: *Comber v. Leyland*, [1898] A.C. 524.

More difficult is the question as to the application of clause (h). The defendant company carries on business at Montreal. It has customers throughout Canada. Customers in Ontario are indebted to it. No doubt, much more than \$200 was owing at the date of the bringing of this action. The contracts with the debtors call for monthly settlement. If the litigation runs its normal course, the property which the company had at the bringing of the action will have disappeared long before judgment can be recovered. These debts will, no doubt, be replaced by other debts; but the company has no fixed or tangible assets within the Province.

Apart from authority, I should have thought that the fiction by which the *situs* of a debt is the residence of the debtor ought not to be imported into the consideration of this Rule, which would be abundantly satisfied if confined in operation to cases where the debtor has assets which can be reached under the ordinary writs of execution. But I am precluded from so holding by the case of *Kemerer v. Watterson* (1910), 20 O.L.R. 451, where Meredith, C.J., has given the wider meaning to the Rule.

I have, therefore, to consider the question whether, as a matter of discretion, the order should be made.

Accepting the principles laid down in *Sirdar Gurdyal Singh v. Rajah of Faridkote*, [1894] A.C. 670, as a guide, the normal course is to require resort to the domicile of the defendant, particularly in the case of contracts entered into at the domicile and to be there performed. No doubt, the jurisdiction of our Court to entertain an action where the writ is served abroad is to be determined by our Court upon the terms of Con. Rule 162. The question whether this Rule in any particular case so transcends the limits fixed by comity and amounts to an assertion of extra-territorial jurisdiction entitled to international recognition,

is one for the foreign Court whose assistance is invoked to enforce our judgment.

Nevertheless, the more recent cases seem to indicate that, in the exercise of discretion in permitting an action to proceed, the Court ought to have regard to somewhat the same principles. In *Société Générale de Paris v. Dreyfus Brothers* (1885-7), 29 Ch. D. 239, 37 Ch. Div. 215, the Court emphatically affirms the existence of the discretion. Mr. Justice Pearson thought that the discretion ought to be exercised in favour of allowing the English action to proceed. Upon appeal the Court thought that the English action ought not to be allowed.

In *Logan v. Bank of Scotland*, [1906] 1 K.B. 141, an action was brought against the Bank of Scotland, and the defendants were served in England. The Court stayed the action, because the action was essentially a Scotch action and ought to be prosecuted before the Scotch Court: the Scotch Court being a convenient and accessible tribunal.

This principle was applied in the case of *Egbert v. Short*, [1907] 2 Ch. 205, where the cause of action arose in India, and would have to be determined according to the law of India, although the defendant had been served in England, when temporarily within the country.

To the same effect is *In re Norton's Settlement, Norton v. Norton*, [1908] 1 Ch. 471. In *Watson & Sons v. Daily Record (Glasgow) Limited*, [1907] 1 K.B. 853, the case was brought within the Rule because an injunction was sought to restrain the repetition of libels published within England. In the exercise of discretion, the Court thought that care ought to be taken that a Scotchman or a foreigner should not be improperly made amenable to the orders of an English tribunal, merely because the case was technically within the Rule; and, therefore, set aside the order allowing service.

It is, I think, a sound exercise of discretion to hold that where the defendant is resident in Montreal, and where the Quebec Court is certainly a convenient forum, and the contract was made in Quebec and is to be interpreted according to the laws of Quebec, and the defendant's assets are all substantially within

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that Province, the plaintiff should be compelled to resort to the Courts of that Province for its remedy, when our Courts only acquire jurisdiction by the mere accident of residence within Ontario of a debtor to the defendant.

The order will, therefore, go, staying all proceedings in this action, upon the service made in Quebec, until after the conclusion of any action which the plaintiff may bring in that Province.

The question of costs will be reserved until any such action is determined.

I adopt this course in preference to now setting aside the service, as the proper incidence of the costs can then be more readily determined; and, if it becomes necessary to resort to Ontario assets, the action may be then allowed to proceed.

## [IN CHAMBERS.]

## REX v. COOK.

1912

Nov. 25.

*Liquor License Act—Amending Act, 2 Geo. V. ch. 55, sec. 13—Person Found Intoxicated in Municipality where Local Option By-law in Force—"Public Place"—Hotel—Conviction—Information.*

An hotel is not a "public place," within the meaning of sec. 13 of 2 Geo. V. ch. 55, an Act to amend the Liquor License Act, providing that, in a municipality in which a local option by-law is in force, a person "found upon a street or in any public place in an intoxicated condition . . . shall be guilty of an offence . . ."

*Regina v. Bell* (1884), 25 O.R. 272, 273, and *Case v. Story* (1869), L.R. 4 Ex. 319, followed.

A conviction under sec. 13 was quashed, because, as far as appeared, the only place where the defendant was found intoxicated was an hotel.

*Semble*, also, that the information (set out below) disclosed no offence.

MOTION to quash<sup>1</sup> a magistrate's conviction.

September 24. The motion was heard by KELLY, J., in Chambers.

*James Haverson*, K.C., for the defendant.

*C. S. Cameron*, for the complainant and the magistrates.

November 25. KELLY, J.:—The defendant was, on the 8th August, 1912, tried before two magistrates and convicted—according to the amended conviction—for being found upon a street and in a public place in an intoxicated condition owing



to the drinking of liquor in a municipality in which what is known as a local option by-law was in force.

Two of the grounds relied upon in support of the motion are: (1) that the information shews no offence under the statute; and (2) that the accused was not found in an intoxicated condition upon a street or in a public place.

The form of information as returned is, that the accused "between June 30th and July 30th, 1912, at Lion's Head, did unlawfully was intoxicated contrary to the provisions of the Liquor License Act upon a street or in a public place in the township of Eastnor." It bears upon its face evidence of having been amended, and it is clear that as first drawn it read "was intoxicated contrary to section eighty-six of the Liquor License Act," and that the amendment made was by striking out the words "section eighty-six" and substituting therefor the words "the provisions," and by adding, after the words "Liquor License Act," the words "upon a street or in a public place in the township of Eastnor."

From the appearance of the document the conclusion might be reached that the amendment was made after the accused had pleaded "not guilty." If the only objection to the conviction were that the information does not shew an offence, I should feel disposed to quash the conviction on that ground; but I do not rest my judgment upon that, but on the other ground mentioned.

Three different forms of conviction have been returned: one being "that said John H. Cook was intoxicated on a street and in a public place in the township of Eastnor on July 8th, 1912;" another, "that said defendant did get intoxicated in the Williams hotel in the township of Eastnor on July 8th, 1912;" and the third, "that the said J. H. Cook on the 8th day of July, 1912, in the township of Eastnor, in the county of Bruce, was found upon a street and in a public place at Lion's Head, in the township of Eastnor, in the said county, in an intoxicated condition owing to the drinking of liquor contrary to the Ontario Liquor License Act and amendments thereto, there being then in force in the municipality of the township of Eastnor a by-law passed by the municipality of Eastnor under section 141 of the Liquor License Act commonly known as the local option by-law."

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While there is quite sufficient evidence that the accused was intoxicated, there is no evidence that he was found intoxicated on a street or in a public place, unless effect is given to the contention set up on behalf of the magistrates that the Williams hotel in Lion's Head, in which the accused was intoxicated, is a public place.

The intention of the amendment to the Liquor License Act made in 1912, 2 Geo. V. ch. 55, sec. 13,\* was to protect the public from being met by the sight of intoxicated persons on streets and in public places of a character similar to streets where the public generally have a right to be; and in making use of the words "any public place" it was, no doubt, intended that it should apply to a place *ejusdem generis* with a street, and not to a place such as the hotel in question.

The words used in the judgment of the Divisional Court in *Regina v. Bell* (1884), 25 O.R. 272, at p. 273, are apt to this case, viz: "To be within its provisions an offence must have been committed in a public place, such as a street, square, park or other open place."

Another case which is strikingly like the present one is *Case v. Story* (1869), L.R. 4 Ex. 319. That was a case where a hackney carriage driver, standing on the premises of a railway company, by their leave, for the purpose of accommodating passengers by their trains, was requested by a person to drive him, and refused; and it was contended that he was bound to do so under the statute which provides that the driver of "every carriage . . . which shall be used for the purpose of standing or plying for hire in any public street or road in any place within a distance of five miles from the General Post Office, in the city of London . . . shall be obliged and compellable to go with any person desirous of hiring such hackney carriage." Kelly, C.B., in his judgment, at p. 323, says: "We have to con-

\*13. Where, in a municipality in which a by-law, passed under section 141 of the Liquor License Act is in force, a person is found upon a street or in any public place in an intoxicated condition owing to the drinking of liquor, he shall be guilty of an offence under the said Act, and upon any prosecution for such offence he shall be compellable to state the name of the person from whom and the place in which he obtained such liquor, and in case of his refusal to do so he shall be imprisoned for a period not exceeding three months or until he discloses such information.

sider the subsequent words of the definition 'in a public street or road.' It is clear to me that railway stations are not either public streets or public roads. They are private property; and although it is true they are places of public *resort*, that does not of itself make them public places. The public only resort there upon railway business, and the railway company might exclude them at any moment they liked, except when a train was actually arriving or departing. For the proper carrying on of their business they must necessarily open their premises, which are nevertheless private, and in no possible manner capable of being described as public streets or roads." And at p. 324, when referring to the contention of counsel that "place" is a large term, he says: "We must take it as only meaning a place *ejusdem generis* with a street."

A perusal of the report of *Curtis v. Embury* (1872), L.R. 7 Ex. 369, is helpful in arriving at the meaning to be given to "a public place." There Bramwell, B., in defining the meaning of "road," which was referred to in the statute then under consideration, and which was used in giving the interpretation of the word "street" used in that statute, said that it "must be a road over which the public have rights."

"Public place" in sec. 13 above, especially when taken in connection with the word "street," which precedes it, must mean a place over which the public have rights as over a street, and not a place where, as a hotel, persons are permitted to go for accommodation such as a hotel affords.

I am unable to agree with the contention set up that the hallway and rooms of the hotel, where alone the accused was found intoxicated at the time in question, is a public place, within the meaning and intention of sec. 13 of the amending Act; and the conviction on that ground alone, apart from any others, must be quashed with costs.

Though giving protection to the magistrates, I must draw attention to the loose and unsatisfactory manner in which the papers in this case, such as the information and conviction and amended convictions, were prepared.

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## [DIVISIONAL COURT.]

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## RICE v. SOCKETT.

*Evidence—Witnesses Entitled to Give Opinion Evidence—"Expert"—Evidence Act, 9 Edw. VII. ch. 43, sec. 10 (O.)—Exceeding Number of Witnesses Allowed—Disregard of Statute—Mistrial—New Trial—Costs.*

In an action to recover a balance of the contract-price for the building of a silo, the defendant set up that the plaintiff did not build or complete the silo in accordance with the terms of the contract. At the trial, the defendant called six witnesses who testified as to the construction of the silo, two of whom he admitted to be experts:—

*Held*, that the six witnesses were persons "entitled according to the law or practice to give opinion evidence," within the meaning of sec. 10 of the Evidence Act, 9 Edw. VII. ch. 43 (O.); and that the statute had been disregarded.

The meaning of the word "expert" considered.

*Held*, also, that the mere refusal of the trial Judge to observe the plain provisions of the statute constituted a mistrial; and the plaintiff was entitled to a new trial, with costs of the last trial and appeal to be paid by the defendant.

APPEAL by the plaintiff from the judgment of the County Court of the County of Wellington.

The plaintiff sued in the County Court for \$180, as the balance of the contract-price for the building of a silo on the defendant's farm.

The defendant denied the allegations of the statement of claim, and set up by way of counterclaim that the plaintiff did not build or complete the silo in accordance with the terms of the plaintiff's contract with the defendant; and that, in consequence thereof, he suffered loss and damage.

The action was tried before the learned County Court Judge without a jury. He gave judgment dismissing the plaintiff's action with costs, and adjudging that the defendant should recover against the plaintiff, on the counterclaim, \$130 and costs.

One of the grounds of the plaintiff's appeal was, that the trial Judge had not observed the provisions of the Evidence Act, 9 Edw. VII. ch. 43, sec. 10 (O.)

October 17. The appeal was heard by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., BRITTON and SUTHERLAND, JJ.

*R. L. McKinnon*, for the plaintiff. The learned trial Judge disregarded the provision of the Evidence Act, 9 Edw. VII. ch.



43, sec. 10, in permitting the defendant to call more than three expert witnesses, without leave being applied for before the examination of such witnesses. [Counsel was stopped at this point.]

*C. L. Dunbar*, for the defendant. Only two experts were called, within the meaning of sec. 10. The other witnesses called by the defence who are said by the plaintiff to be experts, were called merely for the purpose of giving evidence as to the condition of the silo walls. The limitation in the statute refers only to persons who possess a scientific knowledge of the subject, as to which they are called upon to give evidence. Even if one expert more than the statute allows (which is all that can possibly be contended) has been called for the defence, no substantial injustice has been done, and there is no doubt that, if leave had been asked for, the trial Judge would have allowed the additional expert to be called.

*McKinnon*, in reply on this point. The words of the statute are very clear, and the judgment of the learned trial Judge shews that he relied upon those very witnesses whose evidence is in question.

*Dunbar* argued that the trial Judge based his view upon the proved facts in the case, not on the opinions of the witnesses. On the merits of the case, he referred to *Ellis v. Hamlen* (1810), 3 Taunt. 52, followed in *Sherlock v. Powell* (1899), 26 A.R. 407, at p. 408, and in *Cole v. Smith* (1909), 13 O.W.R. 774, 776. *Smeed v. Foord* (1859), 1 E. & E. 602, was referred to; also *Crompton & Knowles Loom Works v. Hoffman* (1903), 5 O.L.R. 554.

November 25. The judgment of the Court was delivered by FALCONBRIDGE, C.J. (after setting out the facts as above):—The plaintiff appeals on several grounds, only one of which, in my opinion, it is necessary to consider, viz., the refusal of the learned Judge to observe the provisions of 9 Edw. VII. ch. 43, sec. 10, which is as follows: “Where it is intended by any party to examine as witnesses persons entitled according to the law or practice to give opinion evidence not more than three of such witnesses may be called upon either side without the leave of

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the Judge or other person presiding, to be applied for before the examination of any of such witnesses.”

The first witness of this class called was A. W. Connor, who is by profession a consulting engineer, and who is admitted by the defendant's counsel to be an expert. The second witness was Charles Butler, whose business is that of cement construction. The third witness who is alleged by the plaintiff to be of this character is Herbert Croft, whose business is concrete work, in which he has been engaged about nine years. The fourth witness is Charles Strange, who stated that his business was general concrete construction.

At this stage, the plaintiff's counsel pointed out that Mr. Dunbar, the defendant's counsel, was limited to three expert witnesses. His Honour overruled the objections, saying simply, “We will take the evidence;” and it was taken accordingly.

The next witness called was George Day, and the same objection was raised by the plaintiff's counsel. This witness is admitted by the defendant's counsel to be an expert. The next witness, William Elliott, is a farmer and cattle dealer, who has a silo, and professes to know what the object of a silo is, and what people should strive to obtain in order to get a perfect silo, and he passes an opinion upon this particular one.

If these witnesses are all experts, three witnesses of that class more than the law allows have been examined.

Mr. Dunbar contends that the only experts are Connor and Day, arguing that the statute applies only to one possessed of science and skill—that is, a man of science having a school of science degree or other special technical education on the subject.

I do not find that this is a correct proposition. No authorities on this branch of the case were cited by either counsel.

It is to be observed that, while the section in question is headed “Expert Evidence,” and while the side-note says, “Limit of number of expert witnesses in action,” yet the word “expert” is not used in the section itself: the phrase being “persons entitled according to the law or practice to give opinion evidence.”

The term "expert," from *experti*, says Bouvier, "signifies instructed by experience."

"The expert witness is one possessed of special knowledge or skill in respect of the subject upon which he is called to testify:" Words and Phrases Judicially Defined, vol. 3, p. 2594.

Dr. John D. Lawson, in "The Law of Expert and Opinion Evidence," 2nd ed., p. 74, lays down as rule 22: "Mechanics, artisans and workmen are experts as to matters of technical skill in their trades, and their opinions in such cases are admissible;" citing numerous authorities and illustrations.

"The derivation of the term "expert" implies that he is one who by experience has acquired special or peculiar knowledge of the subject of which he undertakes to testify, and it does not matter whether such knowledge has been acquired by study of scientific works or by practical observation. Hence, one who is an old hunter, and has thus had much experience in the use of firearms, may be as well qualified to testify as to the appearance which a gun recently fired would present as a highly-educated and skilled gunsmith:" *State v. Davis* (1899), 33 S.E. Repr. 449, 55 So. Car. 339, cited in Words and Phrases Judicially Defined, vol. 3, p. 2595.

In *Potter v. Campbell* (1858), 16 U.C.R. 109, the Court of Queen's Bench held that a person not being a licensed surveyor is a competent witness on a question of boundary.

It is quite manifest, therefore, that these six witnesses were persons "entitled according to the law or practice to give opinion evidence."

The defendant's counsel contends that, even admitting that the statute has been disregarded, there has been no miscarriage of justice. There would, of course, be no question about the matter if the case had been tried with a jury; but, as it is, I find myself unable to accede to this view. It would be impossible to determine the exact effect which the evidence of the three witnesses whose evidence was improperly admitted had on the mind of the Judge. Day, the fifth witness of this class, was admittedly an expert, and a very forcible witness; and the learned Judge seems, on both branches of the case, to have at-

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tached great importance to the evidence of Elliott, the last witness who was called.

But, leaving out these considerations altogether, the mere refusal of the learned Judge to observe the plain provisions of the statute, in my opinion, constitutes a mistrial; and the defendant's counsel (while it appears to have been unnecessary for him actively to oppose the objections) accepted and profited by the rulings of the learned Judge; and, therefore, there must be a new trial, with costs of the last trial and of this appeal to be paid by the defendant.

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[DIVISIONAL COURT.]

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*Gift—Money in Savings Bank—Direction of Customer to Allow Daughter to Draw—Money Placed by Bank in Joint Account—Evidence—Ratification—Survivorship—Relationship of Bank to Customer—Debtor and Creditor—Trust—Failure to Establish—Will—Testamentary Capacity.*

The testatrix, being ill, signed a written direction to a bank, in which she had money to her credit, in a savings bank account, to "arrange my money in E. D.'s name so she can draw it." She gave this to E. D., her daughter, who took it to the bank; and the accountant changed the heading of the account so as to make it a joint account of the testatrix and E. D. or either. This was in August, 1911. Before the death of the testatrix, both she and her daughter drew money from the account upon their respective receipts; and after the death, which occurred in February, 1912, the daughter had what remained of the money transferred by the bank to her sole account. Under the will of the testatrix, the daughter took nothing. The executor sued E. D. and the bank for the money transferred; and she set up as defences: (1) that the money was held in trust for her by her mother; (2) that, according to the arrangement with the bank, ratified by her mother, she was entitled to the money by survivorship; and (3) that the mother was mentally incapable of making a will:—

*Held*, upon the evidence, that E. D. had not succeeded in establishing the alleged trust nor the want of testamentary capacity.

And *held*, that the arrangement made with the bank and what took place between the testatrix and E. D. did not shew a gift of the money to E. D.; it was intended to be placed in her name merely for the convenience of the testatrix, whose money it remained; what was done by the bank in putting the money to a joint account was not ratified by the testatrix; there was no right of survivorship; and E. D. and the bank were liable to the executor for the money transferred.

Review of the authorities.

*Held*, also, that the relationship of bank and customer is not that of trustee and *cestui que trust*, but that of debtor and creditor.

*Foley v. Hill* (1848). 2 H.L.C. 28, 36, followed.

Judgment of KELLY, J., affirmed.



THE plaintiff, who was the executor of the last will of Elizabeth Kenny, deceased, claimed in this action \$542.17, and an injunction restraining the defendants from dealing in any manner with these moneys, which were on deposit with the defendants the Canadian Bank of Commerce at the time of Elizabeth Kenny's death.

The action was tried before KELLY, J., without a jury, at Chatham.

*J. A. Walker*, K.C., and *M. Houston*, for the plaintiff.

*W. G. Richards*, for the defendant Dunkley.

*O. L. Lewis*, K.C., for the defendants the Canadian Bank of Commerce.

July 16. KELLY, J.:—The testatrix, Elizabeth Kenny, made her will on the 16th November, 1911, and thereby appointed the plaintiff, one of her sons, sole executor. She died in the city of Chatham on the 27th February, 1912; and probate of the will was granted on the 4th April, 1912, to the executor.

The assets, as claimed by the executor, consisted of some household furniture and the moneys so on deposit.

The defendant Esther Dunkley is the only daughter of the deceased, and is a half-sister of the plaintiff.

The deceased by her will gave to the executor \$300 to be used by him for the benefit of another son, Charles Kenny, subject to certain directions as to the control thereof and as to the conditions on which payment was to be made to Charles. The household furniture was given to the executor in trust for the use and benefit of Charles, with the right to the executor to retain possession of it until Charles should "alter his present mode of living;" and all the rest of the estate was given to the plaintiff.

The defendant Esther Dunkley claims to be the owner of the money under the circumstances hereinafter set forth, and alleges in her defence that her mother at the time of making the will was not of sound mind, memory, or understanding, and that, if she signed the will, her signature was obtained by undue influence on the part of the plaintiff and his wife and others acting with them.

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At the trial, the claim of undue influence was abandoned, and there is no evidence that any such existed.

The defences, therefore, relied upon by the defendant Esther Dunkley are: first, that the moneys in question were held by her mother in trust for her after her father's death, under an alleged understanding between her father and mother in 1896; secondly, that the money in the bank was held by the mother and this defendant in joint account, with a right of survivorship in the latter; and, thirdly, that the mother was mentally incapable of making the will.

Dealing with the last of these claims, I find that at the time of making the will the testatrix was of sound mind and fully capable of making a will and disposing of any assets which she had.

The evidence shews that the testatrix had at times suffered from neuralgia; that on the 8th November, 1911, she was taken ill in her rooms, where she lived with her son Charles; and that from that date until the 13th November her daughter stayed with her a considerable part of the day-time, but not at night. The daughter says that during that time her mother was in a condition in which she did not at times understand what was taking place around her, that she had delusions, that she did not recognise her or other members of the family who called on her, and that she had a stroke of paralysis on or about the 8th November.

On the 14th November, Esther Dunkley, being ill, was taken to the hospital, and for several weeks following the 13th November she did not see her mother.

Elizabeth Liddy says that she was in the deceased's room for a few minutes on the 15th November; that the deceased was then sitting up, but did not know her or her daughter-in-law, the wife of the plaintiff; that, on the following day, when she called, the deceased had difficulty in recognising her and mistook her for the doctor. This witness on that day had come to borrow from the deceased \$5 for the daughter, Esther Dunkley, and she admits that the deceased was capable of understanding the nature of her message, and, of her own accord and without assistance, took from a pocket-book which she had under the

mattress of her bed the exact amount of money asked for, and gave it to her. Her evidence on this point does not bear out her other statements about the mental condition of the testatrix.

The plaintiff, his wife, his son, and Charles Kenny all deny that on the day the will was made the deceased displayed the mental weakness which was asserted by Esther Dunkley and Mrs. Liddy. Then there is the evidence of the doctor and others who were present when the will was made, some of whom can be said to be disinterested witnesses.

Dr. Holmes, a practitioner of over forty years' standing, who was the deceased's medical adviser, visited her daily for several days beginning on the 9th November, and saw her just before the making of the will, when, he says, she was in her "normal mental condition" and capable of doing business. Referring to the statements made to the effect that the deceased suffered from paralysis, he adds that she never was paralysed, and that he never believed her brain was affected.

Henry Dagneau, a friend of the deceased, for whom she sent some days previously to consult about making her will, and who was present at the time the will was made, and Mr. Clarke, the solicitor called in by Dagneau, say positively that she was in a fit and proper condition to make the will. It is shewn, too, by the evidence of Dagneau and Clarke and others, that, without suggestion from any one, she gave the instructions from which the will was drawn.

On the whole evidence, therefore, I am clearly of opinion that the deceased, at the time of making her will, was in a fit mental condition and perfectly competent to do what she did.

Esther Dunkley, to establish her claim that the moneys in dispute were held by the mother in trust for her after her mother's death, claims that in 1896 a purchase of some property was made by Esther Dunkley's father, Lewis Kenny, and that the deed thereof was made to his wife, Elizabeth Kenny, on the understanding that the daughter Esther would have it after her death. The father died about eleven years ago, and Elizabeth Kenny in 1909 sold the property; and the daughter claims

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that \$800 out of the proceeds of the sale was deposited in the Canadian Bank of Commerce in the account now in question, and that the moneys sued for are part of that \$800.

To support her contention she produced a will made by her mother, in January, 1899, when she was suffering from an attack of typhoid fever, by which she purported to devise to her husband, Lewis Kenny, and this daughter, the lands acquired by her in 1896, to hold to them jointly during the lifetime of the husband, and at his death to the daughter, her heirs and assigns.

To corroborate this, John H. Barnes, one of the witnesses to that will, was called, and swore that at the time of the making of the will he heard Mrs. Kenny say that she wanted Mrs. Dunkley to have the place—that that was the understanding between her and her husband.

Mrs. Liddy says she was in the adjoining room when the will was being made, and that she heard Mr. and Mrs. Kenny say the property would go to the daughter after their death.

The evidence of Charles Kenny, on the other hand, is that, at the time the prior will was made, his mother was so ill as not to be able to recognise him, and that a few months before her death she informed him she did not know of the will until two weeks after she had returned from the hospital after her recovery from the fever.

There is some doubt, too, about the ownership of the money with which the purchase of the property was made in 1896; and I am unable to say, on the evidence, that it is clear that it belonged to Lewis Kenny and not to his wife.

I am not prepared to accept the evidence of the trust as sufficient to establish it. I believe that the defendant Esther Dunkley's account of the terms of the alleged understanding that the property was to be hers on the death of both her parents, was suggested to her largely by reading the prior will.

The evidence of Barnes and Mrs. Liddy is consistent with the terms of the will, and does not go further than to shew the intention of the testatrix, at that time, to make her daughter her devisee, subject to the benefits given to the husband.

Mrs. Liddy's evidence throughout was weakened by an evi-



dent bias in favour of Esther Dunkley, and must be accepted with some hesitation.

Though Esther Dunkley claims that there was the understanding at the time of the purchase of the property that she would be entitled to it after the death of her parents, and that she knew of the understanding at that time, her subsequent conduct in no way indicated that she believed or relied upon such understanding. When the property was sold about three years ago, she was present and saw and heard her mother make a statutory declaration, the terms of which might well indicate a denial of any trust in favour of the daughter, and it does not appear that either then or at any other time in her mother's lifetime she asserted any right to the property, or made the question of the alleged trust a subject of conversation either with her mother or with any other person. Moreover, when there was talk of a new will being made, in November, 1911, the daughter shewed considerable concern, and she says that she warned Dagneau against drawing a new will.

Considering that all that the mother owned or professed to own at that time, outside of the furniture, which was of little value, was the money which the daughter now claims was held in trust for her, one cannot well understand this concern or her anxiety that a new will should not be made, if she really believed the property was held in trust for her.

Dagneau's evidence is, that a short time before the will was made, in November, 1911, he met Esther Dunkley in the street, and she informed him that either she or her mother could draw the money which was then in the bank; and she asked him if he thought it would be safe to leave it there, or should she draw it out; and, in answer to his inquiry as to who owned the money, she replied, "Of course it is mother's." She does not deny this, but says that she does not remember making the statement. Dagneau also says that, when the testatrix first discussed with him the making of the will of November, a few days before it was made, Mrs. Dunkley wanted her mother to leave some of the money in the bank to her, but that the mother refused. Mrs. Dunkley denies this, however.

As between these two, it is to be considered that Dagneau is

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a disinterested witness, and gave his evidence straightforwardly and candidly, while the evidence of Mrs. Dunkley is self-serving.

Do not these circumstances indicate that Mrs. Dunkley did not believe in the existence of the trust she now sets up, and that she considered the money as belonging to her mother?

It would, to my mind, be most dangerous to allow a trust to be established on evidence such as has been put forward in this instance.

The further claim of the defendant Esther Dunkley that she is entitled to the money in the bank by way of survivorship is based on the happenings in August, 1911. There was then on deposit the sum of \$574.71 in the savings department of the Canadian Bank of Commerce at Chatham, in the name of Elizabeth Kenny, the account being numbered K.68. Elizabeth Kenny was then in St. Joseph's Hospital, Chatham, suffering from bronchitis, and on that day she signed a memorandum in the following words: "Arrange my money in Esther Dunkley's name so she can draw it. Elizabeth Kenny. Chatham, August 18th, 1911."

Esther Dunkley says this memorandum was drawn by her at her mother's dictation, and was signed by her mother, who requested her to take it to the bank and have it arranged so that either could draw it. On the same day, she took it to the bank; and, on its being presented to the accountant of the bank, he changed the heading of the deposit account so as to read as follows: "Made joint a/c, August 18th, 1911. Elizabeth Kenny & Esther Dunkley or either;" after which she returned to her mother and told her that either of them could draw it, and that the mother was satisfied. The deposit book remained in possession of the deceased until the time of her death.

Between the 18th August and the death of Elizabeth Kenny, three withdrawals were made from the account: one on the 26th August, for \$5, by Esther Dunkley; another on the 20th September, for \$5; and a third on the 24th October, for \$35—these two being by Elizabeth Kenny.

Esther Dunkley further says that, at the time the memorandum was drawn, the mother said to her, "If anything should happen to me in the hospital, take my money and my furniture

and do the best you can with it," and that the mother requested her to pay her funeral expenses.

During Mrs. Kenny's last illness, the wife of the plaintiff went to the bank and asked the manager if any one could draw the money in the event of Mrs. Kenny's death; but the manager says that the question was a hypothetical one, and he replied something to the effect that executors only could draw the money. He also says that at that time he had no personal knowledge of the account.

On the 9th March, less than two weeks after the death of the testatrix, the defendant Esther Dunkley went to the bank and drew from the account the full balance then standing, namely, \$542.17, and deposited it in the same bank in a private account in her own name, which she had there for some months previously. Before this was done, there had been talk of trouble being caused over the ownership of the money, and this had come to the knowledge of the manager of the bank before the money was paid over to Mrs. Dunkley.

Subsequent to the 9th March and prior to the service of the injunction order, Mrs. Dunkley drew from her account two sums, one of \$99 and the other of \$245, out of which she says she has paid \$88 for her mother's funeral expenses, and \$37.25, the accounts of two doctors who attended her mother. Even if the money is found to be hers, she makes no claim for repayment of these sums.

Are these facts sufficient to entitle Esther Dunkley to the moneys on her mother's death? If the claim is to rest on what was said to her by her mother at the time the change was being made in the bank account, i.e., that, if anything should happen to the mother while in the hospital, Esther was to take the money and furniture and do the best she could with it, she cannot succeed, for this would simply amount to an ineffectual attempt at making a testamentary disposition: *Hill v. Hill* (1904), 8 O.L.R. 710.

On the other hand, did the signing of the memorandum authorising a change in the bank account so that the daughter could draw on it, give the daughter any right to or ownership in the moneys, either during the mother's lifetime or at her death?

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I cannot find in the evidence any expression of intention on the part of the mother so to benefit the daughter, or that the mother intended anything more than to make an arrangement by which, for convenience sake, the daughter could draw the money, the mother at the time being unwell and unable to go to the bank.

In *Payne v. Marshall* (1889), 18 O.R. 488 (cited for the defendants), the defendant had in her possession a large sum of money which her husband had given her, and she went with him to the bank to deposit it; and, on a question arising as to the power of withdrawing it in case of the wife's illness, the money, at the suggestion of the banker, was deposited in both their names, subject to withdrawal by either; and it so remained uninterfered with up to the time of the husband's death. It was held that there was a good gift *inter vivos* to the wife. The effect of the decision in that case was that the moneys which were the wife's did not, merely by being deposited in the two names, cease to be the property of the wife. Mr. Justice MacMahon, in delivering the judgment of the Divisional Court, said (p. 493): "There is no doubt the husband could have withdrawn the money and have deposited it to his own credit; but unless the wife after the gift to her made a re-gift or re-transfer of the money to him, his removal of the money from its place of deposit would not deprive the wife of her right to that money and to follow it if it had been deposited to his own credit. The money being put in the husband's name as well as the wife's, was not intended in any way to change the rights of the wife in the ownership of the sum deposited, but was merely deposited in that way for the sake of convenience so that it could be drawn upon in the event of the wife's illness."

The present case is not one where the money became the property of the mother and daughter jointly; it was the mother's; and, though the memorandum authorised its being placed in the daughter's name so that she could draw it, it remained the property of the mother—the daughter's powers or rights being limited to the power to draw.

In *Marshall v. Crutwell* (1875), L.R. 20 Eq. 328, a husband in failing health told his banker to change his bank account from



his own name into the name of himself and his wife, and authorised the banker to honour the cheques of either himself or his wife; from that time until the husband's death, all cheques on the account were drawn by the wife at the direction of the husband, the proceeds being applied by her to household purposes and small sums for her own use; and all sums afterwards paid in by the husband were carried to the credit of the account in the joint name. Sir George Jessel, M.R., in delivering judgment, held that the change in the bank account was a mere arrangement for convenience, that it was not intended as a provision for the wife, and that on the husband's death she was not entitled to it.

*Low v. Carter* (1839), 1 Beav. 426, *Re Ryan* (1900), 32 O.R. 224, and *Schwent v. Roetter* (1910), 21 O.L.R. 112, all cited by the defendants, are distinguishable from the present case, in that there was in them an intention on the part of the depositor that the survivor should become entitled to the money.

In *Low v. Carter*, a husband directed a stockbroker to make the purchase of certain stock in the joint names of himself and his wife for the purpose, as he stated to the stockbroker, of making a provision for his wife; there was also evidence that the testator, the day before his death, said that, the property in the bank being in the joint names, he considered it belonged to his wife solely at his decease, and, therefore, he had no occasion to leave it to her by his will. By his will he bequeathed to his wife a life interest "in all his property that he was in possession of." It was there held that the stock did not pass. In that case there was a clear intention on the part of the husband that on his death the stock should belong to his wife.

In *Re Ryan*, the husband made the deposit expressly in the name of himself and his wife jointly, to be drawn by either, or, in the event of the death of either, to be drawn by the survivor; and there was evidence, too, that the money which went into the account was owned partly by the husband and partly by the wife.

In *Schwent v. Roetter*, the depositor transferred money to the joint credit of himself and his daughter, to be drawn by either of them. The learned trial Judge there, however, found upon the evidence that the father intended that the money should

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be at the call of either of them; and that, if any were left at his death, the daughter was to have it.

No such intention is to be found, however, in the present case. If anything further was necessary to shew that Esther Dunkley did not become entitled to these moneys on her mother's death, it is found in her admission to Dagneau, above referred to, that the money was her mother's.

Prior to her mother's death, she does not appear to have considered herself in any way interested in the money. On the evidence of Dagneau and from the evident concern which she shewed about the making of the will, it is difficult to understand how she could have believed that she was entitled to it.

I, therefore, find that there was no intention on the part of the mother to make the daughter the owner or part owner of the money or to give it to her by survivorship; the money continued to belong to the mother; and, on her death, it became part of her estate.

Then as to the claim against the bank. The memorandum signed by Mrs. Kenny clearly stated that the object of making the change in the bank account was "so that she (the daughter) could draw it," and nothing more. The authority of the bank was limited to doing what this memorandum directed; and, in so far as the bank or its officers or clerks went beyond what was directed, they exceeded the authority given. The bank took upon itself too much when it altered the bank account as it did.

It is a question in my mind whether the daughter would have made any claim to the moneys if the words "joint account" had not been used in altering the account. The use of these words may well have suggested ownership by survivorship to the daughter or some person representing her.

The bank, too, had notice, before any of the money was drawn out, that there was trouble contemplated over the ownership of it; but it disregarded the warning and allowed the money to be transferred into the name of the daughter, and a considerable portion of it to be afterwards drawn by her. I think, under the circumstances, the bank, as well as its co-defendant, is liable to the plaintiff for the amount of the deposit (less, however, the sums which Esther Dunkley has paid as the funeral expenses

and doctors' bills of the deceased) with interest from the commencement of the action. The defendants are restrained from dealing with these moneys otherwise than to pay them to the plaintiff.

Judgment will go accordingly with costs.

The defendants appealed from the judgment of KELLY, J.

November 5. The appeal was heard by a Divisional Court composed of CLUTE, RIDDELL, and SUTHERLAND, JJ.

*O. L. Lewis*, K.C., for the defendants, argued that the order to the bank signed by the mother constituted the daughter, Esther Dunkley, a joint owner of the moneys on deposit: *Schwent v. Roetter*, 21 O.L.R. 112; *Marshal v. Crutwell*, L.R. 20 Eq. 328; *Re Ryan*, 32 O.R. 224; *Payne v. Marshall*, 18 O.R. 488. It was not an ineffectual attempt to make a testamentary disposition. On the question of corroboration, he referred to *Batzold v. Upper* (1902), 4 O.L.R. 116. He also contended that the bank was in the position of a trustee.

*M. Houston*, for the plaintiffs, relied upon the judgment of the learned trial Judge. He contended that the bank was not a trustee, but the relationship of banker and customer was that of debtor and creditor. There was no corroboration of the story that Esther Dunkley went back to her mother and told her that the money had been placed in a joint account in the bank, and that the mother had assented to this. The order had not been given by the mother with the intention of making a gift of the money to her daughter, but merely that the daughter might be able to draw it for the convenience of the testatrix: *Marshal v. Crutwell*, *supra*; *Hill v. Hill*, 8 O.L.R. 710.

November 29. CLUTE, J.:—The plaintiff, as the executor of Elizabeth Kenny, deceased, brings this action to recover \$542.17 from the defendants, Esther Dunkley and the Canadian Bank of Commerce. This sum stood to the credit of the testatrix, Elizabeth Kenny, in the Canadian Bank of Commerce at the time of her death, which occurred on the 27th February, 1912.

On the 9th March, 1912, the defendant Esther Dunkley withdrew this sum from the bank, and placed the same to her own credit in the same bank, and now claims it as her own.

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The circumstances under which this claim is made are as follows:—

The testatrix, Elizabeth Kenny, being ill, gave to her daughter, Esther Dunkley, a memorandum in writing in the following words: "Arrange my money in Esther Dunkley's name so she can draw it. Elizabeth Kenny. Chatham, August 18th, 1911."

It is not disputed, as the evidence shews, that this was intended for the local agent of the Canadian Bank of Commerce at Chatham. This instrument was taken to the bank, and on the 26th August, 1911, the defendant Esther Dunkley drew from the bank \$5, and gave a receipt therefor in her own name, the money being in the savings bank department. On the 2nd September, 1911, Elizabeth Kenny drew \$5 from the bank, signing her own name to the receipt; and on the 29th October a further sum of \$35, signing her own name to the receipt.

On the 9th March, 1912, the defendant Esther Dunkley had the whole amount placed to her credit by signing a receipt therefor to the bank. She claims this money upon two grounds. The first is, that there was a verbal trust declared in her favour by her father, whereby she was to receive certain moneys, of which this formed a part, after her mother's death. The trial Judge has found against this claim, and I think justly so. The evidence falls far short, in my opinion, of creating a trust in her favour.

A further claim is made that the late Elizabeth Kenny authorised a joint account, and upon her death the right to the money in the bank survived to Esther Dunkley. The memorandum above referred to was signed by Elizabeth Kenny while in the hospital; on the day it was signed, she (Esther Dunkley) took it to the bank; and, on its being presented to the accountant at the bank, he changed the heading of the deposit account so as to read as follows: "Made joint account August 18th, 1911, Elizabeth Kenny and Esther Dunkley, or either;" after which, she says, she returned to her mother and told her that either of them could draw it, and that the mother was satisfied. The deposit book remained in the possession of the deceased until the time of her death.



Esther Dunkley described the conversation which took place between her mother and herself in this way: "She," meaning the mother, "said, 'I want you to take my money and do the best you can with it.' I said, 'I could not cheque your money without you gave me some authority to do it.' She said, 'You get a pen and ink.' I got it, and she started to write, and then she said, 'No, you write it;'" and I wrote it and read it over, and she signed it." This refers to the memorandum on which the agent of the bank acted in changing the account. She says that she read it aloud to her mother, and her mother said it was all right, and signed it. She further says: "She told me to take it to the Bank of Commerce and have it arranged in the bank so that I could draw her money or she could, and I took it." She then took it to the bank. The manager not being in, she told a Mr. Watson, accountant in the bank, that "my mother gave me this and wanted me to have her money arranged in the bank so I could draw it; and he took the paper and read it, and he said he made it a joint account so that I could draw it or my mother could." She then returned to the hospital and told her mother it was all right. "The paper was all right, and that it made a joint account; that she (the mother) could draw it or I could draw it; and that, if anything happened to her, I could draw it all; and the mother said it was all right."

The first question is, whether the money became the joint property of the mother and daughter during the mother's lifetime? What is the meaning of the words, "Arrange my money in Esther Dunkley's name so she can draw it?" Draw whose money? Plainly, I think, the mother's money—the intention being that the mother should have her money in the bank so placed that the daughter could draw it instead of the mother drawing it. There is no indication or hint of intention to make a gift of the whole or any part to the daughter.

The trial Judge says: "The present case is not one where the money became the property of the mother and daughter jointly; it was the mother's; and, though the memorandum authorised its being placed in the daughter's name so that she could draw it, it remained the property of the mother—the daughter's powers or rights being limited to the power to draw."

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And he finds that there was no intention on the part of the mother to make the daughter part owner of the money or to give it to her by survivorship. The money continued to belong to the mother, and on her death it became a part of her estate.

In *Re Ryan*, 32 O.R. 224, the husband deposited money with a savings company and caused an account to be opened in the name of himself and his wife jointly, "to be drawn by either, or in the event of the death of either, to be drawn by the survivor," and it appeared by the evidence uncontradicted that money of the wife went into the account and that both drew from it indiscriminately. It was there held that she was entitled as survivor to the whole fund.

The present case, I think, is distinguishable in this, that here no part of the daughter's money went into the account. The mother retained the deposit book. She did not authorise, as far as the evidence shews, a joint account; the money was to be so placed that her daughter might draw it, but it was the mother's money that she was to draw. It is true that the daughter states that on her return to her mother she told her that it was placed to their joint account, and the mother said it was all right; but the trial Judge has not accepted the accuracy of her statement in this regard.

In *Hill v. Hill*, 8 O.L.R. 710, the plaintiff's father owned \$400 on deposit in the bank to his credit. He procured a bank deposit receipt for this amount, "payable to William Hill Sr. and John R. Hill, his son, or either, or the survivor." The understanding between father and son was, that the money should remain subject to the father's control and disposition while living, and that whatever should be left at his death should then belong to the son. The father's request to the bank manager was, "to fix the money so that his son John would get it when he was done with it." The father told his son that he wanted him to get the money when he was gone. He, however, retained the deposit receipt in his own possession, and it was found among his papers at the time of his death. The trial Judge, in giving judgment, said that, if the deposit receipt stood unexplained, so that it might be treated as evidencing the substance of the transaction, the plaintiff's contention might be

sustained upon the authority of such cases as *Payne v. Marshall*, 18 O.R. 488, and *Re Ryan*, 32 O.R. 224. But he found as a fact that the purpose of the father was, by the means there employed, to make a gift to his son in its nature testamentary; and, as such, it could only be made effectually by an instrument duly executed as a will.

It appears to me that that is the effect of what took place here; that there was no intention to make a present gift of any part of the property in the money so on deposit to the defendant Esther Dunkley—the intention, from the whole evidence, being to authorise her, during her mother's lifetime, to draw from the bank such sums as might be required—and that probably it was her intention that after her death the daughter should have the balance.

In *Schwent v. Roetter*, 21 O.L.R. 112, *Hill v. Hill* is distinguished, it being held that, in the circumstances disclosed in the *Schwent* case, the money was during the joint lives joint property with right of survivorship. Of this the plaintiff was not able to satisfy the trial Judge; and, upon the whole case, I agree in the result at which he arrived.

The appeal should be dismissed with costs.

RIDDELL, J.:—This is an appeal from the judgment at the trial of Mr. Justice Kelly. In his judgment the facts are set out in detail, and not much is to be added in that regard.

It was argued, however, that, as Mrs. Dunkley swore that, being told at the bank that the money was to be put to the joint account of herself and her mother, she reported this to her mother, and her mother said that was all right, etc., the mother must be taken to have ratified the act of her daughter in having the amount put to a joint account; and, consequently, whatever the effect of the writing of the 18th August, there was a placing by the mother of the money to joint account.

If this did take place, it would perhaps be hard to resist the conclusion desired; but the learned trial Judge does not find that what is alleged did take place in fact. He finds that the daughter “returned to her mother and told her that either of them could draw it, and that the mother was satisfied.” As my learned brother did not specifically find that what is alleged as

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taking place about a joint account did take place, I have thought it well to see him in the matter, and he informs me that he did not believe the statements of Mrs. Dunkley first above referred to.

We are, therefore, to take the facts as found by the learned trial Judge (on this point) as the only facts in the case—and all question of ratification is, consequently, removed.

Much of the argument addressed to us on behalf of the appellants was based upon the proposition that the bank was a trustee. But, since the case of *Foley v. Hill* (1848), 2 H.L.C. 28, 36, the relationship of banker and customer has uniformly been held to be not that of trustee and *cestui que trust*, but that of debtor and creditor. There is nothing sacred in the position of banker—he sells the use of money; nor is there anything abstruse or recondite in his relation to his depositor—he is an ordinary debtor.

The bank in this case took Mrs. Kenny's money on the implied agreement to return it to her or her personal representatives when called on so to do. They have paid it to another—they must justify their action.

I am of opinion that the document of the 18th August, 1911, has a plain meaning—that it is a direction to the bank so to place the customer's money as that Esther Dunkley can draw it—and that only. There is no gift of the money to the daughter: if that had been the case, there would have been no necessity of directing an arrangement that she might draw. There is no authority to place the money in a joint account in such a way that the survivor should have all. No objection could be taken to the opening of an account protected in such a way that, while the daughter might draw during the lifetime of her mother, her authority would then cease—if this further consideration were borne in mind, that the mother might at any time cancel the arrangement and revoke the authority of her daughter.

It seems to me that the last consideration is fatal to any claim by the bank to create a "joint account" with all its legal consequences. Must it not be perfectly plain that this document does not prevent the customer at any time revoking the authority to her daughter, and resuming sole control? If so, how can



such an account be properly opened—an account giving the daughter a vested interest in any part of the fund in existence at the time of her mother's death? In my opinion, the document is nothing but an authorisation to the bank to arrange matters in such a way as that the old woman would not herself be forced to sign cheques, etc., etc.

Had I been of a different opinion, I should not have been satisfied to give the bank judgment without further evidence concerning the circumstances of Mrs. Everly's visit to the bank. Mrs. Everly asked the manager in reference to Mrs. Kenny's account, if any one could draw it in case of her death. The manager told her, "Nobody can draw another person's money except her executor or whoever appoint." The manager says that he looked upon this as a hypothetical question. In a sense that is true, but the question was asked about a definite, existing, and by no means hypothetical fund in his bank; and it was, as I think, his duty to find out the exact situation of that fund and answer accurately any question put to him in reference thereto by any one who had the right to ask it.

But I do not think that there is any need to find out all the circumstances of this transaction.

There is nothing in any of the objections urged against the judgment appealed from; and the appeal should be dismissed with costs.

SUTHERLAND, J.:—I agree.

*Appeal dismissed with costs.*

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## [DIVISIONAL COURT.]

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Dec. 6.

*Criminal Law—Police Magistrate—Jurisdiction—Summary Trial for Theft—Case Begun before one Magistrate and Continued before another—Criminal Code, secs. 668, 708—Police Magistrates Act, 10 Edw. VII. ch. 36, secs. 10, 18, 34 (O.)—Prohibition—Acquittal of Defendant—Application before Certificate of Acquittal Issued—Status of Informant as Applicant—Duty of Magistrate, after Service of Notice of Motion—Adjournment of Hearing—County Crown Attorney—Conduct of.*

An information was laid by H. before the Police Magistrate for the City of S., charging R. with the theft of a horse. A warrant was issued, and R. was brought before the said Police Magistrate; R. was admitted to bail and directed to appear for trial before the Police Magistrate for the Town of St. M., in the same county as the City of S. R. went before the Police Magistrate at St. M., surrendered himself into custody on the charge, pleaded "not guilty," and elected to be summarily tried by that magistrate. The informant objected, and his counsel attended and protested against the assumption of jurisdiction. The informant had been served with a subpoena to attend, but failed to do so. The magistrate proceeded with the trial; and, though served with a notice of motion for prohibition, acquitted R.:—

*Held*, reversing the order of SUTHERLAND, J., in Chambers, refusing prohibition, that sec. 708 of the Criminal Code does not apply to a summary trial for an indictable offence.

2. That sec. 668 of the Code does not purport to confer jurisdiction, and must be confined to cases in which the accused is rightly before the Justice.
  3. That no statute authorised the course pursued, and the question arising upon the motion must be decided upon general principles.
  4. Having regard to the statute relating to Police Magistrates, 10 Edw. VII. ch. 36, secs. 10, 18, 34(O.), that a magistrate has no power, once he has undertaken a case, to discharge himself, save in the case of illness or absence; he has no power to request another magistrate to sit for him; and, if once he acts, he must continue to the end.  
*Regina v. Milne* (1875), 25 C.P. 94, *Regina v. Gordon* (1888), 16 O.R. 64, and *Regina v. McRae* (1897), 28 O.R. 569, specially referred to.
  5. That prohibition may be granted at the very latest stage, as long as there is anything to prohibit; and here, although the magistrate had acquitted, he might still grant a certificate of acquittal; and, therefore, prohibition might yet be awarded.  
*In re Brazill v. Johns* (1893), 24 O.R. 209, and *Mayor, etc., of London v. Cox* (1867), L.R. 2 H.L. 239, 254, followed.
  6. *Seem*, that the magistrate, having been served with the notice of motion for prohibition, should have enlarged the hearing until the question of jurisdiction had been determined—there being no power in the Court to stay proceedings in the inferior Court pending the hearing of the motion.
  7. That the informant had a *locus standi* as an applicant for prohibition.
  8. Remarks upon the conduct of the County Crown Attorney in the various proceedings.
- Order of SUTHERLAND, J., reversed.

A MOTION on behalf of N. J. Holman for an order prohibiting G. D. Laurier, Police Magistrate in and for the Town of St. Mary's, in the County of Perth, from proceeding further in connection with a certain information or complaint laid by Holman on the 26th September, 1912, before James O'Loane, Police Magistrate in and for the Town of Stratford, in the same county, against Edgerton Rea, in which it was charged that at St. Mary's, on the 14th September, 1912, he, Rea, sold a horse, the property of one William J. Rea.

October 18. The motion was heard by SUTHERLAND, J., in Chambers.

*Featherston Aylesworth*, for the applicant.

*R. C. H. Cassels*, for the respondent.

November 2. SUTHERLAND, J.:—The ground set out in the notice of motion is, that the magistrate had no jurisdiction in respect of the matter.

A civil action is pending with reference to the sale of a horse, in which William J. Rea is plaintiff and Holman and one Guest are defendants. An examination for discovery was had in the civil action, and the defendant Holman thereafter laid the information. The alleged theft was charged to have been committed at the town of St. Mary's. A warrant was issued on the 26th September, 1912, for the arrest of Edgerton Rea, and he was arrested on that day. He appeared before Police Magistrate O'Loane in Stratford, was admitted to bail, and directed to appear the next day before Police Magistrate Laurier at St. Mary's.

Police Magistrate Laurier, in an affidavit filed in answer to the motion, states that the accused, on the 29th September, 1912, appeared before him and surrendered himself into custody on the said charge, elected to be tried before him, and pleaded "not guilty." The trial was then fixed by Police Magistrate Laurier for the 30th September, at St. Mary's, at 10.30 a.m.; and the Crown Attorney was notified to appear and prosecute the charge.

On the 30th September, shortly after the hour appointed, the accused again appeared in St. Mary's before the said magistrate, and was surrendered into custody, but the complainant Holman did not appear nor any witnesses on his behalf. It appears from the affidavit of a constable that, on the 27th September, Holman

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had been informed that the trial was fixed for the 30th and the hour and place of trial. On that day, after Court had adjourned, Police Magistrate Laurier received a telegram from Holman's solicitors in the following terms: "Complainant Holman disputes your jurisdiction in Rea case."

On the 3rd October, at the opening of Court at 10.30 a.m., the notice of this motion was served on Police Magistrate Laurier; and counsel on behalf of Holman appeared and "disputed the jurisdiction of the Court to hear the charge."

The complainant Holman, though subpœnaed to attend, did not do so. The magistrate thereupon proceeded with the case, and, after hearing evidence, acquitted the accused.

The complainant says that Police Magistrate O'Loane directed the accused to appear before Police Magistrate Laurier without any notice to him and without his knowledge, and that he neither heard the complainant in person or by solicitor, counsel, or agent before making such direction. Under these circumstances he asks for the order mentioned.

Section 665 of the Criminal Code reads as follows:—

"The preliminary inquiry may be held either by one Justice or by more Justices than one."

"(2) If the accused person is brought before any Justice charged with an offence committed out of the limits of the jurisdiction of such Justice, such Justice may, after hearing both sides, order the accused at any stage of the inquiry to be taken by a constable before some Justice having jurisdiction in the place where the offence was committed."

If this section applies, then the Police Magistrate at Stratford did not comply with its terms, since he plainly did not hear both sides before ordering the accused to be taken before the other Justice. As I understand the counsel for the applicant, he contends, in the first place, that there was no preliminary inquiry at all, under the section, before the Police Magistrate at Stratford; and, consequently, the magistrate could not make the order permitted by the section. He further, however, contends that, even if what was done by the magistrate amounted to a preliminary hearing, it was not regular, in that he did not hear both sides. But does this section apply? I am not clear that it does. Was the alleged offence committed out of the jurisdiction of the Police



Magistrate at Stratford, who took the information? By 10 Edw. VII. ch. 36, sec. 24 (O.), it is provided, that "every Police Magistrate shall be *ex officio* a Justice of the Peace for the whole county or district for which or for a part of which he is appointed."

The Police Magistrate at Stratford is, therefore, *ex officio*, a Justice of the Peace for the whole county of Perth, and the alleged offence was committed at the town of St. Mary's, in that county. He must, as it seems to me, have been proceeding under some other section.

It is provided by sec. 708 of the Criminal Code that "any one Justice may receive the information or complaint, and grant a summons or warrant thereon, and issue his summons or warrant to compel the attendance of any witnesses for either party, and do all other acts and matters necessary preliminary to the hearing, even if by the statute in that behalf it is provided that the information or complaint shall be heard and determined by two or more Justices." He could properly proceed under this section. Even if he desired to hear a case outside the limits of the town for which he was Police Magistrate, and had the power to do so, he could not be compelled to do so. See sec. 31 of 10 Edw. VII. ch. 36 (O.)

Under sec. 708, the Police Magistrate at Stratford, therefore, as a Justice of the Peace for the County of Perth, might receive the information in this case and issue his summons or warrant thereon. He did this. He could also, under that section, do all other acts and matters necessary preliminary to the hearing. He could also admit the accused to bail, unless sec. 18 of ch. 36 applies. The alleged offence having been committed in the town of St. Mary's, it was natural and proper that it should be disposed of by the Police Magistrate for that town, either by way of preliminary hearing, or, if the accused elected to be tried by him, by trial and disposition.

Section 668 of the Criminal Code is as follows: "When any person accused of an indictable offence is before a Justice, whether voluntarily or upon summons, or after being apprehended with or without warrant, or while in custody for the same or any other offence, the Justice shall proceed to inquire into the matters charged against such person in the manner hereinafter directed." The Police Magistrate at St. Mary's found the accused before him after being apprehended, as already indicated, or else volun-

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tarily. He should thereupon proceed, and I think it was his duty to do so, to inquire into the matter: *Regina v. Mason* (1869), 29 U.C.R. 431; *The Queen v. Burke* (1900), 5 Can. Crim. Cas. 29.

On the accused electing to be tried by him, he could proceed, under sec. 707 of the Criminal Code, to hear and dispose of the case. The informant had been told of the time and place when and where and the Police Magistrate before whom the accused was directed to appear. He did not appear then, nor on the morning first fixed for the trial. He was thereupon served with a subpoena to attend the trial on the day finally fixed therefor. He was not present in person, but was represented by counsel attending to object to the magistrate's jurisdiction. He cannot complain that full opportunity to appear and give evidence or assist in securing a conviction, if that were possible, in the circumstances of the case, were not given to him.

I think, under the circumstances, that the Police Magistrate at St. Mary's did what he did rightly; and that this motion must be dismissed with costs.

N. J. Holman appealed from the order of SUTHERLAND, J.

November 25. The appeal was heard by a Divisional Court composed of MIDDLETON, LENNOX, and LEITCH, JJ.

*C. A. Moss*, for the appellant, argued that the Police Magistrate had no jurisdiction in the matter, as it never came before him. He would have jurisdiction if it ever did come properly before him. It was brought in the first place before the magistrate at Stratford, who "shunted it over" to the magistrate at St. Mary's. Counsel for Holman appeared there on the 3rd October, and objected to the transfer. The learned Judge in the Court below thought that it could be justified under sec. 708 of the Code; but that section deals only with summary convictions, and not, as here, with a summary trial of the accused. The learned Judge also relied on sec. 668, but that section does not confer jurisdiction.

*R. C. H. Cassels*, for the respondent, argued that the case was properly tried at St. Mary's, as the magistrate there was, *ex officio*, a magistrate for the whole county, though not bound to act. He referred to sec. 679 of the Code, and to 10 Edw. VII. ch. 36, sec. 31. The appellant was notified of the trial on the 30th September, and subpoenaed to attend on the 3rd October, but

failed to attend. In any case it was now too late to make this application, which, in the circumstances, was a mere *brutum fulmen*, as there was now nothing to prohibit. The absence of a certificate is no answer to this objection: *In re Robertson and City of Chatham* (1899), 26 A.R. 554. At most, all that has been shewn is mere irregularity, and there is no absence of jurisdiction. The accused appeared at the trial, and that founds jurisdiction: *Regina v. Mason*, 29 U.C.R. 431; *Regina v. Justices of Antrim*, [1895] 2 I.R. 603.

*Moss*, in reply, referred to Crankshaw's Criminal Code, 3rd ed., p. 811. There is still something to prohibit, *viz.*, the certificate.

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December 6. MIDDLETON, J.:—An information was laid by Holman before the Police Magistrate at Stratford, charging Rea with the theft of a horse. A warrant was issued, and Rea was brought before the Police Magistrate at Stratford, when he was admitted to bail and directed to appear for trial before the Police Magistrate at St. Mary's.

The accused thereupon went before the Police Magistrate at St. Mary's, surrendered himself into custody on the charge, pleaded "not guilty," and elected to be summarily tried by that magistrate. The complainant objected to the trial proceeding before the Police Magistrate at St. Mary's, and his counsel attended and protested against the assumption of jurisdiction; whereupon the magistrate proceeded with the trial; and, the informant not appearing, the magistrate—although served with the notice of motion for prohibition—acquitted the accused. The informant had been served with a subpoena to attend, but failed to do so.

Upon the motion for prohibition, the learned Judge took the view that the course adopted was justified by sec. 708 of the Code; his attention not having been drawn to the fact that this section is one of the group of sections, 705 to 770, relating entirely to summary convictions, and that the case in hand was a summary trial of the accused, by his consent, for an indictable offence.

The learned Judge also relied upon sec. 668 of the Code, which provides that "when any person accused of an indictable offence is before a Justice, whether voluntarily or upon a summons . . . the Justice shall proceed to inquire into the matters charged against such person in the manner hereinafter directed." This

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section, then, does not purport to confer jurisdiction, and must, I think, be confined to cases in which the accused is rightly before the Justice; in which case the procedure to be followed is pointed out.

Upon the argument, counsel failed to point out any section authorising the adoption of the course pursued in this case. The case, therefore, falls to be determined upon general principles.

*Regina v. McRae* (1897), 28 O.R. 569, determines that, where an information is laid before a magistrate, he becomes seized of the case, and that no other magistrate has any right to take part in the trial, unless at the request of the magistrate before whom proceedings are taken. All the magistrates in the county have jurisdiction; but, so soon as proceedings are taken before any one of these officers having concurrent jurisdiction, he becomes solely seized of the case. The magistrate has under the statute—and possibly apart from the statute—the right to ask other magistrates to sit with him; and, if he does so, the whole Bench becomes seized of the complaint: *Regina v. Milne* (1875), 25 C.P. 94.

The statute relating to Police Magistrates, 10 Edw. VII. ch. 36, sec. 18 (O.), recognises this principle. So also do secs. 10 and 34, which provide that the Deputy Police Magistrate, or, if there is no Deputy, any other Police Magistrate appointed for the county, may proceed for the Police Magistrate in the case of his illness or absence. Neither of these sections gives to the magistrate any power, once he has undertaken the case, to discharge himself, save in the case of illness or absence. He has no power to request another magistrate to sit for him. Contrast the provisions of the two sections with sec. 18, which provides that in the case falling within it the magistrate may so request. By sec. 31, where the case arises out of the limits of the city, the Police Magistrate is not bound to act; but, if once he does act, it appears that he must continue to the end.

This view of the statute is quite consistent with the view taken in *Regina v. Gordon* (1888), 16 O.R. 64.

It is argued on behalf of the respondent that prohibition ought not now to be awarded because nothing remains to be done before the magistrate. The magistrate has acquitted. He had no jurisdiction. All that he has done is a nullity, and it may be that a more proper motion would have been for a *certiorari*, so that



the proceedings taken before the magistrate might be quashed. But I think there is yet one thing that the magistrate may assume to do, and that is to grant a certificate of acquittal; therefore, prohibition may yet be awarded.

As said in *In re Brazill v. Johns* (1893), 24 O.R. 209, a prohibition may be granted at the very latest stage, so long as there is anything to prohibit. From the very earliest times this has been recognised as the guiding principle. In the historic answers of the Judges to the *articuli cleri*, resulting in the statute 9 Edw. II. ch. 1—found in 2 Inst. 602—it is said: “Prohibitions by law are to be granted at any time to restraine a Court to intermeddle with, or execute anything, which by law they ought not to hold plea of, and they are much mistaken that maintaine the contrary

. . . for their proceedings in such case are *coram non iudice*. And the King’s Courts that may award prohibitions, being informed either by the parties themselves, or by any stranger, that any Court temporall or ecclesiasticall doth hold plea of that (whereof they have not jurisdiction) may lawfully prohibit the same, as well after judgement and execution, as before.” A statement which is referred to with approval by Willes, J., in *Mayor, etc., of London v. Cox* (1867), L.R. 2 H.L. 239, 254.

I have the less hesitation in awarding prohibition where the magistrate proceeds with the hearing of the case having knowledge that his jurisdiction is disputed. It would be more seemly for all tribunals charged with the administration of justice to act in such a way as to avoid any suspicion that the course adopted is in any way the result of temper.

Here, the magistrate, knowing that his jurisdiction was disputed, and after having been served with a notice of motion for prohibition, dismissed the charge without having heard the informant’s evidence, and apparently sought to put the informant in the position of either attorning to his jurisdiction by appearing in obedience to his summons, or risking everything upon the result of the motion. It would have been more consistent with judicial dignity to have enlarged the hearing until the question of jurisdiction had been determined.

There is no power in the Court to stay proceedings in an inferior Court pending the hearing of the motion: *In re Miron v. McCabe* (1867), 4 P.R. 171; and this should make all inferior tribunals

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reluctant to act in a way that will afford any foundation for the argument here presented, that the motion is rendered nugatory by what has been done after the motion was on foot.

The citation from Coke also answers another objection made to this motion, that the informant had no *locus standi* to apply.

I think it my duty to draw attention to another matter appearing upon the material. In *Livingston v. Livingston* (1907), 13 O.L.R. 604, the Court has spoken with no uncertain sound concerning the position occupied by Local Masters who are by law allowed to practise. What is there said does not apply to the full extent to the conduct of Crown Attorneys; who are—unfortunately, I think—allowed to practise generally. But what has taken place in this case serves to indicate the difficulties that all too frequently arise from this mischievous state of affairs.

Holman purchased a horse from Edgerton Rea, and paid him. William J. Rea, the father of Edgerton, brought an action of replevin to recover the horse. In that action he swore that his son had no authority to sell the horse. If his evidence is true, the son is guilty of larceny. The Crown Attorney appears in the replevin action as counsel for the father. When the information is laid, the son is taken before the magistrate, the Crown Attorney is notified, appears, and consents to the case being transferred to the other magistrate, without in any way communicating with the informant. When the informant goes before the other magistrate to protest against his jurisdiction, the Crown Attorney appears to conduct the prosecution, and apparently assents to the course adopted by the magistrate in acquitting the prisoner pending the motion. When this motion is made, the Crown Attorney appears for the magistrate, and argues that the Court has no jurisdiction because the prosecution is ended, and is then awarded costs against the informant. One who thinks that this indicates something wrong in the administration of justice is not necessarily an unreasonable man.

The appeal should be allowed, and the prohibition granted, with costs against the defendant and the magistrate.

LENNOX and LEITCH, JJ., agreed in the result.

*Appeal allowed.*

[FALCONBRIDGE, C.J. K.B.]

## ROYAL TRUST CO. v. MOLSONS BANK.

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Dec. 9.

*Banks and Banking—Customer's Deposit—Claim of Bank on Overdue Notes—Right of Set-off—Assertion of Lien—Relation between Customer and Bank—Creditor and Debtor—Application of Deposit on Cross-debt—When Made—Interest.*

In the case of a deposit of money with a bank, the relation between the customer and the bank is that of creditor and debtor; there is no specific property of the customer in the bank upon which the bank can assert a lien; the bank's right is that of set-off.

At the death of L., the defendant bank had money on deposit to his credit bearing interest at three per cent.; and, when this was demanded by the plaintiffs (his executors), the bank, on the 6th January, 1910, refused to allow the money to be withdrawn until some settlement was made relative to overdue notes upon which L. was endorser. On the 29th April, 1911, a cheque upon the deposit account was given by the plaintiffs, and other payments were made sufficient to discharge the whole indebtedness on the notes with interest as calculated by the plaintiffs:—

*Held*, that, at any time after the notes became due, the bank would have been entitled to apply the deposit on account of the indebtedness, or, in other words, to set off its indebtedness to the depositor against the depositor's indebtedness to the bank *pro tanto*. If on the 6th January, 1910, the bank so applied the deposit, the unpaid balance of the indebtedness continued to bear interest at five per cent., and on that basis was ultimately paid; but, if no application of the deposit was made, the bank wrongfully refused to allow it to be withdrawn, and the plaintiffs were entitled to interest at five per cent.—the result being the same.

ACTION by the executors of T. W. A. Lindsay, deceased, to compel delivery up by the defendants of two promissory notes endorsed by the deceased and an assignment to the plaintiffs of collateral securities held by the defendants. The defendants counterclaimed for a balance of \$885.10, alleged to be owing by the deceased.

November 25. The action was tried before FALCONBRIDGE, C.J. K.B., without a jury, at Toronto.

*J. Bicknell, K.C.*, and *A. G. F. Lawrence*, for the plaintiffs.

*W. L. Scott*, for the defendant bank.

December 9. FALCONBRIDGE, C.J.:—The facts are admitted. They appear from the correspondence produced, and for the present purpose may be very briefly stated.

The plaintiffs are the executors of T. W. A. Lindsay, who died on the 15th September, 1909. A few days after Lindsay's death, two promissory notes upon which he was endorser became due

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and remained unpaid in the hands of the defendant bank, namely, one for \$3,700, on the 25th September, and one for \$47,000, on the 27th September.

The admitted liability of the estate on these notes amounted (with interest at five per cent. per annum) on the 5th January, 1910, to the sum of \$51,405.60.

At his death, Lindsay also had money on deposit with the bank, bearing interest at three per cent., repayable on demand; and on the 5th January, 1910, the manager of the plaintiff company wrote to the bank as follows: "The executors desire to invest the funds now held by the Molsons bank at credit of the above estate, and we shall feel obliged if you will be good enough to advise us as to the exact amount against which the executors may issue their cheque."

In reply, the manager of the bank wrote on the 6th January, 1910: "The amount at the credit of the late Mr. T. Lindsay to the 31st of December, 1909, is \$33,882.67. I note that you wish to draw this amount, but I regret having to advise you that our head office cannot allow this money to be withdrawn until some settlement has been made relative to the overdue notes of the Metropolitan Electrical Co., on which the late Mr. T. Lindsay is an endorser."

The plaintiffs now claim that on this date interest at three per cent. per annum to the 6th January should be added to the amount at the credit of the estate in the deposit account, making a total of \$33,899.37 principal and interest as at that date, and that this sum should be deducted from the amount then due on the notes, leaving a balance of \$17,506.23 as the net indebtedness of the estate to the bank.

The bank, on the other hand, claims that, after the 6th January, 1910, the notes continued to bear interest at 5 per cent. and the deposit account at three per cent. only, until the 29th April, 1911, when a cheque upon the deposit account was given by the executors to the bank and received by the bank without prejudice to the rights of the parties.

The bank's position is explained in its manager's letter of the 14th February, 1912, as follows: "I am in receipt of your letter of the 12th instant, asking me to advise you as to the grounds upon which the bank's claim for interest is based. I would have



thought that these grounds sufficiently appeared from the correspondence that has passed between us. It is shortly that until receipt of the cheque for \$35,240 enclosed in your letter of the 28th of April, 1911, the bank has never received any authority or even request to apply the amount standing to the credit of the estate of the late Thomas Lindsay on account of the indebtedness to the bank on the notes of the Metropolitan Electrical Company. You will observe that, although on January 6th, 1910, I wrote to you stating that the bank could not allow the amount standing to the credit of the late Thomas Lindsay to be withdrawn until some settlement had been made relative to the overdue notes of the Metropolitan Electrical Company, the bank had no right at that time to apply the amount on account of the indebtedness in question, and was not in a position to do so, and was not even requested to do so until receipt of the cheque enclosed in your letter of the 28th of April, 1911."

The amount of this cheque with other payments made by the executors was sufficient to discharge the whole indebtedness of the estate, according to the plaintiffs' method of calculation, i.e., \$17,506.23 with interest at five per cent. from the 6th January, 1910; but, according to the defendant bank's method of calculation, there is still a balance of \$885.10, with interest since the issue of the writ (18th June, 1912).

The plaintiffs ask that the bank be directed to deliver up to the plaintiffs the notes in question and to assign to the plaintiffs the collateral securities held by the bank in connection with the debt.

The bank denies the plaintiffs' right and counterclaims for the \$885.10 and interest.

In my opinion, the plaintiffs' view is the correct one. At any time after the notes become due, the bank would have been entitled to apply the deposit on account of the indebtedness, or, in other words, to set off its indebtedness to the depositor against the depositor's indebtedness to the bank *pro tanto*, as was done in *Jones v. Bank of Montreal* (1869), 29 U.C.R. 448. In that case it was held that this application of the deposit was an answer to an action by the customer for refusing to honour the customer's cheque, because there were no funds left upon which a cheque might be drawn.

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On the 6th January, 1910, the bank was placed in the same position as if it had refused to honour the plaintiffs' cheque. It either applied the deposit on account of the note indebtedness, or it did not do so; and in either case the result seems to be the same. If it so applied the deposit, then the unpaid balance of the indebtedness continued to bear interest at five per cent., and on this basis was ultimately paid. If no application of the deposit was made, then the bank wrongfully refused to allow the amount on deposit to be withdrawn, and the plaintiffs are entitled to interest at five per cent. on the deposit, instead of three per cent. as theretofore.

No doubt, it has been said that the ordinary banker's lien extends to money on deposit with a bank (*vide, e.g., Misa v. Currie* (1876), 1 App. Cas. 554, at p. 569). But the word "lien" is used in this connection only as a *façon de parler*. "A lien is the right of a person having possession of the property of another to retain it until some charge upon it or some demand due him is satisfied" (Century Dictionary.)

Wharton's definition, *sub verb.*, does not differ materially from this.

But it is well known that in the case of a deposit of money with a bank the relation between the customer and the bank is that of creditor and debtor. There is no specific property of the customer in the possession of the bank upon which the bank can assert a lien.

The distinction is drawn very accurately in a passage from Morse on Banking, quoted with approval in Hart on Banking, 2nd ed. (1906), p. 742: "It is often stated that the lien attaches to money; but inasmuch as, quite apart from any question of lien, a banker is only bound to pay to, or to the order of, his customer, the amount of the balance due to the latter after deducting what is due to the banker himself from the customer, the lien will not normally have any effective application to moneys. Indeed, as is well said in the treatise of Mr. Morse on the American Law of banking (Boston, 4th ed., p. 596), the word 'lien' cannot properly be used in reference to the claim of the bank upon a general deposit, for the funds on general deposit are the property of the bank itself. The term 'set-off' should be applied in such cases, and 'lien' when a claim against paper or valuables on special or specific deposit is referred to. In the cases the words are used

very loosely, and sometimes the true force of a case has been mistaken by text-writers through failure to keep in mind this distinction. The practical effect of lien and set-off is much the same. They result in balancing opposing claims, and since transfers of a general deposit are subject to the equities between the bank and the depositor, until notice to the bank, its right of set-off is as good in respect to a general deposit as its lien in respect to a specific deposit for collection or as collateral."

It follows, in my opinion, that the argument which was advanced on behalf of the bank is not well founded, viz., that there was a lien on the plaintiffs' account in favour of the bank, and that the only effect of the letter of the 6th January, 1910, was to assert the lien; but that otherwise the deposit was not affected until the plaintiffs themselves chose to apply it on account of the indebtedness.

There will be judgment for the plaintiffs as prayed with costs, and the counterclaim will be dismissed with costs—all on the High Court scale.

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Dec. 10.

*Will—Construction—Absolute Gift to Daughter—Restriction—Discretion of Trustee—Invalidity—Further Restriction against Encroachment during Coverture—Validity—"I Wish"—Obligatory Import—"Settled upon herself"—Extended Meaning of.*

The Court of Chancery has always leaned against the postponement of vesting or possession or the imposition of restrictions on an absolute vested interest. In a will, a sum of money cannot be given absolutely, coupled with a direction that the trustee of the money is to exercise a discretion as to the times and manner of payment. Such a scheme can be carried out effectively only by making the gift or legacy entirely dependent on the discretion of the trustee, or by means of a gift over to some other beneficiary.

*Wharton v. Masterman*, [1895] A.C. 186, *In re Johnston*, [1894] 3 Ch. 304, *Re Rispin* (1911), 25 O.L.R. 633, 636, and *In re Rispin, Canada Trust Co. v. Davis* (1912), 46 S.C.R. 649, followed.

A testator gave to his daughter, on her attaining twenty-one, and after provision being made for his widow, one-fourth of the remainder of his estate, with the proviso that, if the trustees should think it undesirable for any reason that the share should be paid, they might defer the payment of the whole or any part to such time or times as they might think best, and in the meantime pay only the income to the daughter:—*Held*, that the restriction was inoperative.

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In a later clause of the will, the testator said: "I wish all my money that my daughter . . . may inherit from me should be settled upon herself so that in the event of her marriage it will be impossible for her or her husband to encroach upon the same:"—

*Held*, that this clause might well stand with and modify the earlier clause: the effect being that the money representing the daughter's share of the estate was to be given to her as her own absolutely, provided only that during coverture she should enjoy it to her separate use and so that it should not be encroached upon by her or her husband during coverture; after coverture the restriction would end, and she would have it as if unmarried.

*Re Hutchings to Burt* (1888), 59 L.T.R. 490, *In re Fearon* (1897), 45 W.R. 232, and *In re Bown* (1884), 27 Ch.D. 411, distinguished.

*Held*, also, that the words "I wish" carried an obligatory import and were sufficient to create a trust.

*Held*, also, that the words "settled upon herself" meant that there should be a trustee and a proper conveyance to him, to be settled by the Master or a conveyancing counsel.

MOTION by the trustees under the will of Robert Hamilton, deceased, for an order, under Con. Rule 938, determining certain questions arising upon the construction of the will.

December 9. The motion was heard by BOYD, C., in the Weekly Court at Toronto.

G. H. Watson, K.C., for the trustees.

R. A. Hall and S. T. Medd, for legatees.

December 10. BOYD, C.:—By the will the testator intends and directs that distribution shall be made of part of his estate when his youngest child attains twenty-one, and his widow remains unmarried; but this was apparently frustrated by the income of the whole estate being required for the use of the widow during her life; and only upon her death, in May, 1912, has the opportunity for making a division of the estate among the beneficiaries arisen.

By the will the daughter, on attaining twenty-one, and after making provision for the widow, is to be paid one-fourth part of the remainder of his estate, with this proviso, that, if the trustees should think it undesirable for any reason that the share should be paid, the testator authorises them to defer the payment of the whole or any part to such time or times as they may think best, and in the meantime to pay only the annual income arising therefrom to the child.

The testator then provides for a further division upon the death of the widow of that part of the estate set aside for her (which in the result proved to be the whole of the estate), and to dispose



of it as mentioned in the paragraph preceding, and closes with a repetition of the provision that the trustees shall have the right to defer the payment of the shares of the children as in the preceding clauses mentioned.

If these clauses stood alone, the situation would be that the trustees are directed to pay to the daughter her fourth share, subject to their discretion in deferring the payment, and meanwhile paying only the income to the beneficiary.

Upon this part of the will the question was raised, whether the daughter has a present right to payment in full of the corpus, ignoring the discretionary power committed to the trustees.

The other question raised arises upon the consideration of a later clause, in which the testator thus expresses himself: "I wish all my money that my daughter Annie Seaton may inherit from me should be settled upon herself so that in the event of her marriage it will be impossible for her or her husband to encroach upon the same." And the further question is, whether, notwithstanding this "wish," the money shall still be paid without restriction or condition to the daughter, who is now a married woman.

The will of the testator was made in October, 1866; he died in January, 1893; the widow died in May, 1912. The daughter Annie Seaton was born in May, 1873, attained majority in 1894, and married H. C. Hill in December, 1905. (Whether there is any offspring does not appear.)

Upon the early clauses of the will as penned and standing *per se*, I think, contrary to my first impression, that the better view is, that they are inoperative so far as regards any discretionary control of the trustees to defer or withhold the corpus of the daughter's share. The law appears to be settled that a sum cannot be given absolutely, coupled with a direction that the trustee of the money is to exercise a discretion as to the times and manner of payment. Such a scheme can be carried out effectively only by making the gift or legacy entirely dependent on the discretion of the trustee, or by means of a gift over to some other beneficiary. The matter was discussed as if it were a new point by Stirling, J., in *In re Johnston*, [1894] 3 Ch. 304—a decision followed in *Re Rispin* (1911), 25 O.L.R. 633, 636, which was

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affirmed in the Supreme Court of Canada: *In re Rispin, Canada Trust Co. v. Davis* (1912), 46 S.C.R. 649.

But the foundation of the rule is of older standing. The Court of Chancery has always leaned against the postponement of vesting or possession or the imposition of restrictions on an absolute vested interest: *Wharton v. Masterman*, [1895] A.C. 186, *per* Lord Davey, at p. 198; and in the same case, at p. 192, Lord Herschell deals thus with the doctrine, that it was regarded by the Courts "as a necessary consequence of the conclusion that a gift had vested, that the enjoyment of it must be immediate on a beneficiary becoming *sui juris*, and could not be postponed until a later day unless the testator had made some other destination of the income during the intervening period."

The next point discussed was, whether the married daughter was entitled to receive her full share irrespective of the provision that "the money inherited" from her father should be "settled upon herself," etc. This later discretion, if it conflicts with the earlier one, must prevail according to the usual rule. It perhaps does not so much conflict, as deal with this bestowment of his bounty in another point of view; *i.e.*, the element of marriage is introduced and the desire is expressed to protect the wife from the control or influence of the husband. And what is aimed at is a partial restriction on the enjoyment of the legacy so that it shall not "be encroached upon," *i.e.*, alienated or anticipated, during coverture. In this view this clause may well stand with and modify the other. That is to say, both yield this meaning: the money representing the daughter's share of the estate is to be given to her as her own absolutely, provided only that during coverture she shall enjoy it to her separate use [*i.e.*, settled upon herself], and so that it shall not be encroached upon by her or her husband during coverture. After coverture the restriction ends, and she has it as if unmarried.

The restraint is annexed to the separate estate only, and the separate estate has its existence only during coverture: Lord Langdale in *Tullett v. Armstrong* (1838-9), 1 Beav. 1, 4 My. & Cr. 377. The words of the will are satisfied if the restraint is limited to the contemplated coverture, which is now actually existing, and it may well end therewith; so that, when discoverd, she may dispose of the corpus as she pleases.

Of the cases cited for the daughter, *Re Hutchings to Burt* (1888), 59 L.T.R. 490, is really in support of the view that the clause is valid. The gift was in that case to a daughter unmarried, with a request that she should not sell or dispose of any part; and it was held that this request did not act in derogation of the absolute gift to the daughter. There was no intention from the words used to indicate that a restraint upon alienation was meant that would operate only during coverture—there was no reference to the possible marriage of the daughter in that will. And the Court held that no such limited restraint was in the mind of the testator; but we find just the contrary as to this testator. So *In re Fearon* (1897), 45 W.R. 232, is a case decided with much doubt by Kekewich, J., who held that where a legacy was to be paid to a married woman for her separate use, without power of anticipation, the cases compelled him to reject these last words and to order the corpus to be paid to her in the peremptory words of the will. He was giving effect to *In re Bown* (1884), 27 Ch.D. 411. The rule there laid down was that when the bequest is to a married woman for her separate use absolutely, with a clause restraining her from anticipation, the question whether that restraint is effectual does not depend upon whether it is a lump sum in cash or an incoming-bearing fund, but upon whether the testator has shewn an intention that the trustees should keep the property and pay the income to the beneficiary. And the whole decision turned upon the words of the trust, which were, *to pay to the married woman*. If these words were found in the latter clause of this will, as they do appear in the earlier one, I should be bound by this case also. But the words are different in the later clause and they are the prevalent words, *viz.*, the money is (not to be paid to her) but “settled upon her,” which, in my opinion, completely differentiates the present will from the others in the citations.

Comment has been made on the words used, “I wish,” as not being sufficient to create a trust; they may carry an obligatory import, and they have been used by the testator in the context of the will in that sense: *In re Burley*, [1909] W.N. 253, *per* Joyce, J.; and *Liddard v. Liddard* (1860), 28 Beav. 266. *Parker v. Bolton* (1835), 5 L.J.N.S. Eq. 98, is by no means as strong a case as this.

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The other words, "settled upon herself," have a well-known testamentary significance. For instance, the form of settlement involved is shewn by *Loch v. Bagley* (1867), L.R. 4 Eq. 122, where the direction was to "settle" the daughters' shares "upon themselves strictly." That was extended by the Court to mean that the property should be so dealt with that the income of the share should for the joint lives of wife and husband be paid to her for life without power of anticipation; that, if she should die in the lifetime of her husband, then her share should go as she should by will appoint, and, in default of appointment, to her next of kin exclusively of her husband; and that, if she should survive her husband, then the share should belong to her absolutely.

Some such form is applicable to the present case: there should be a trustee of the settlement provided, and a proper conveyance settled by the Master or a conveyancing counsel, if the parties cannot agree, to whom the trustee of the will may discharge himself by a transfer of the fund.

This is a proper case for the estate to bear the costs to be taxed.

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[DIVISIONAL COURT.]

1912

FROST AND WOOD CO. LIMITED V. LESLIE.

Dec. 13.

*Costs—County Court Action—Alternative Money Claims—Payment of Money into Court—Acceptance in Satisfaction of Smaller Claim—Scale of Costs—Con. Rule 425—"Satisfaction of all the Causes of Action"—Estoppel—Res Judicata—Appeal—Election—Terms—New Action.*

In an action in a County Court, the plaintiffs claimed \$504.29, the amount of an open or stated account; and, in the alternative, \$180.29, the amount of two promissory notes made by the defendant, and, with a third note, offered to the plaintiffs in settlement of the account. There was a dispute as to whether the plaintiffs had accepted the notes. The defendant brought into Court \$180.29 and interest, and said that it was sufficient to satisfy the plaintiffs' claim. The plaintiffs notified the defendant that they accepted the sum paid into Court in satisfaction of their alternative claim; and, taking the money out of Court, proceeded to tax costs. These were taxed by the clerk on the County Court scale; and that was affirmed on appeal to the County Court Judge. Subsequently the plaintiffs brought another action to recover the amount of the third promissory note:—



*Held*, on appeal from the order of the Judge, that two causes of action were included in the first action, and satisfaction of one cause of action was not "satisfaction of all the causes of action," within the meaning of Con. Rule 425.

*Held*, also, that the claim for \$504.29 could not be said to be at an end so that estoppel or *res judicata* would be an answer if it was again set up.

*Coote v. Ford*, [1899] 2 Ch. 93, 99, followed.

And *held*, therefore, that the plaintiffs should be at liberty to elect one of two courses: (1) they might accept the money taken out of Court in full satisfaction of their claims, and hold their judgment with County Court costs up to judgment, but must pay to the defendant his costs of the appeal from the taxation and of this appeal, and dismiss their second action with costs; or (2) they must be considered as not having brought themselves within Con. Rule 425, and must repay the money into Court with interest, and pay the defendant his costs of taxation and of the two appeals.

An appeal by the plaintiff from an order of the Judge of the County Court of the County of Bruce.

The following statement of the facts is taken from the judgment of RIDDELL, J.:—

This action was brought in the County Court of the County of Bruce. The statement of claim sets out that the defendant was the agent of the plaintiffs at Hanover on commission; that he was to obtain such security for the payment of any implements sold by him as such agent as would be satisfactory to the plaintiffs, etc.; that the plaintiffs shipped him a large quantity of implements accordingly; that a statement of accounts was made on the 9th November, 1911, shewing that the defendant owed the plaintiffs \$504.29; that, at the defendant's instance, as he could not pay at once, the plaintiffs' traveller took promissory notes for \$480.29 as follows: due the 1st January, 1912, \$80.29; due the 1st June, 1912, \$100; due the 1st October, 1912, \$300: total \$480.29; to submit to the plaintiffs; that the plaintiffs refused to accept them, and returned them to the defendant forthwith; that nothing has been paid; that the defendant sometimes asserts that the plaintiffs took the notes in settlement, but this the plaintiffs deny. A statement of the items, amounting to the sum of \$504.29, is annexed to the statement of claim; and the plaintiffs claim to recover from the defendant the said sum of \$504.29 and interest from the 9th November, 1911; or, in the alternative, to recover from the defendant the sum of \$180.29, the amount of two of the three promissory notes, and interest thereon.

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It does not exactly appear whether the plaintiffs are claiming as on an account stated or on the open account—from the items being attached to the record, I presume the latter.

The statement of defence sets up that it was the recognised custom to accept the personal notes of the defendant for any balance due; that the plaintiffs' agent, Appleby, "settled the balance at \$480.29, and insisted and demanded that the defendant should furnish his promissory notes . . ." as mentioned, which he did; that he, on the 13th June, 1912, paid the plaintiffs the sum of \$184.39, being the amount of the first two promissory notes with interest, but the plaintiffs refused to accept it, and repudiated the settlement; and he brought into Court that sum and said that it was sufficient to satisfy the plaintiffs' claim.

The plaintiffs thereupon served a notice in the following terms: "Take notice that the plaintiffs accept the sum of \$184.34 paid by you into Court in satisfaction of their alternative claim herein;" and, taking the money out of Court, proceeded to tax costs. These were allowed by the clerk on the County Court scale; and, on appeal to the County Court Judge, the clerk's ruling was upheld.

The defendant now appeals.

Since the judgment already spoken of, the plaintiffs have begun another action upon the note for \$300, or, in the alternative, for damages for conversion thereof.

November 11. The appeal was heard by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., RIDDELL and LENNOX, JJ.

*T. H. Peine*, for the defendant, argued that the plaintiffs were entitled to costs on the Division Court scale only, and that the defendant was entitled to County Court costs and a set-off. The plaintiffs did not take the money out of Court "in satisfaction of all the causes of action," and so they did not bring themselves within Con. Rule 425: *Moon v. Dickinson* (1890), 38 W.R. 278, 63 L.T.R. 371. The defendant should not be saddled with two sets of County Court costs.

*G. H. Kilmer*, K.C., for the plaintiffs, contended that the alternative cause of action involved the whole matter. The defendant had pleaded that he had settled the whole of the plaintiffs' claim by giving the three notes. The plaintiffs had taken the money

out of Court in full of the alternative cause of action on one of the notes, and so had adopted the settlement alleged by the defendant; and there was nothing left of the other alternative cause of action. The plaintiffs would be estopped as a matter of record if they were to set up again the original cause of action. That cause of action was at an end, and the plaintiffs were rightly within Con. Rule 425: *Babcock v. Standish* (1900), 19 P.R. 195; *Stephens v. Toronto R.W. Co.* (1907), 13 O.L.R. 363.

*Peine*, in reply.

December 13. RIDDELL, J. (after setting out the facts as above):—The state of affairs, then, is, that the plaintiffs contended that, while there may have been a settlement of the amount due them from the defendant, there was no settlement of the account by notes; but that he owed them \$504.29, i.e., \$24 more than the amount of the notes; but, if it turned out that the notes were accepted in settlement, then they wanted the amount of the notes. The defendant said that the notes were given in settlement; he did not deny that the notes should be paid, but he said that, within a week of the writ, he “paid” the amount of the notes which were due, but the plaintiffs refused to accept the payment, and repudiated the settlement. It is perfectly manifest that, had the case gone on, the only issue to be tried would be whether the notes were accepted, as the defendant says they were. With what we know now, that would have been determined in favour of the defendant; and the defendant would have been entitled to all the costs subsequent to payment in, and to the sum by which his County Court costs before that time would exceed his Division Court costs. As it is, by paying money into Court, the plaintiffs contend, he has enabled them to compel him to pay more costs than he would have paid had the action gone to trial. In other words, the plaintiffs contend that, by suing for a claim they cannot support, and adding their real and supportable claim as an alternative, they may tax costs properly attributable only to the unsupportable claim. This would be a monstrous result; and we must examine the Rules with care to see if they make such a result necessary.

The Rule is Con. Rule 425: “When the plaintiff takes out money in satisfaction of all the causes of action, he may tax his costs of the action and sign judgment therefor, unless the defendant

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pays them within 48 hours after taxation." The former Rule read, "the entire cause of action" (Con. Rule 637)—the change being made in order that there could be no doubt that the action was at an end: *Moon v. Dickinson*, 63 L.T.R. 371.

Here there are two causes of action, alternative indeed, but still two. How can it be said that satisfaction of one cause of action, and that the minor one, is a satisfaction of all the causes of action?

It is argued that the plaintiffs would be estopped as by matter of record, if they were to set up again the original cause of action; and, consequently, that cause of action is at an end. (I do not discuss the effect of the new action, with which, as I think, we have nothing to do.)

Stirling, J., in *Coote v. Ford*, [1899] 2 Ch. 93, at p. 99, says: "I do not see how any such proceedings could ever be available as a ground for a plea of *res judicata*. If either party were to attempt to re-open the matter, the appropriate defence of the other would seem to be, not a plea of *res judicata*, but an application to the Court to stay proceedings;" and the learned Judge was there speaking of the cause of action on which specifically money had been paid in. It is *à fortiori* in the case of a cause of action upon which money has not been paid in.

The plaintiffs must, in my opinion, elect either to take the money paid in, in full satisfaction of their claims against the defendant, in which case they may retain their taxation of costs in the County Court: *Babcock v. Standish*, 19 P.R. 195; *McKelvey v. Chilman* (1903), 5 O.L.R. 263; *Stephens v. Toronto R.W. Co.*, 13 O.L.R. 363; but must dismiss their other action with costs; or they must be held not to have brought themselves within Con. Rule 425; in this case they must repay the money into Court with interest, and pay the defendant his costs of taxation, of the appeal to the County Court Judge, and of this appeal.

If they elect the former alternative, they will hold their judgment with County Court costs up to the judgment; but pay to the defendant his costs of the appeal from the Taxing Officer and of this appeal.

FALCONBRIDGE, C.J., and LENNOX, J., agreed in the result.

*Order accordingly.*



[MIDDLETON, J.]

## MCBRIDE v. McNEIL.

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Dec. 14

*Improvements—Lien on Land for—Increased Selling Value—Expenditure Made upon Faith of Owner's Intention to Give Land to Improver—Estoppel—Enforcement of Lien—Possession—Sale upon Default of Payment.*

A person who has expended money for the benefit of another, or on property in which he has no interest, has, as a rule, no lien in respect of such expenditure against such other person or against the owner of the property. But to this general rule there is an exception, based upon the principle of estoppel: where the owner of property stands by and allows a person to spend money thereon in the expectation that he will receive the benefit of it, such person is entitled to a lien for the increased value resulting from such expenditure; and the same principle applies where the expenditure is made upon the faith of a statement by the owner of his intention to give the land to the person making the improvement.

*Unity Joint-Stock Mutual Banking Association v. King* (1858), 25 Beav. 72, *Plimmer v. Mayor, etc., of Wellington* (1884), 9 App. Cas. 699, and *Ramsden v. Dyson* (1866), L.R. 1 H.L. 129, followed.

This last-mentioned principle was applied in favour of a defendant in an action by his mother's administrator to recover possession of a farm, where the defendant's mother had encouraged him to improve the farm by telling him that he would ultimately have the benefit of his labour and expenditure.

The defendant was *held*, entitled to enforce his lien, not by retaining possession of the farm, but by sale upon default of payment within a limited time of the amount found due for improvements.

In estimating the amount, the defendant was allowed only for permanent improvements which had increased the selling value.

ACTION to recover possession of the east half of lot No. 3 in the 2nd concession of the township of Wallace.

November 27. The action was tried before MIDDLETON, J., without a jury, at Stratford.

*G. Bray*, for the plaintiff.

*J. C. Makins*, K.C., for the defendant.

December 14. MIDDLETON, J.:—Catherine McBride was in her lifetime the owner of the land in question, by virtue of a Crown patent dated the 12th August, 1848. She died on the 26th June, 1912. The right of the plaintiff, as administrator of her estate, to possession of the land, was admitted at the trial, although denied in the pleadings.

The defendant claims to be entitled to a lien upon the land for improvements said to have been made under mistake of title, by virtue of the statute, and also claims a lien apart from the statute.

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The facts giving rise to the present situation are as follows. The deceased and William McNeil lived together as man and wife for many years, but they never intermarried, as they had both been theretofore married and were living separate from their respective spouses. David McBride, the plaintiff, is the lawful issue of Catherine McBride and her wedded husband. The defendant is one of several children, issue of the unlawful union. As Catherine died intestate, the plaintiff will take her entire estate beneficially.

The late William McNeil and Catherine McBride settled upon the lot in question many years ago. The patent for the west half was taken in the name of one of the sons of William. The patent for the east half was taken in the name of Catherine.

In the first place, the defendant bases his claim upon the fact, as he says, that he thought the patent to the east half had been taken in his name. He says that he inferred this from the fact that the patent for the other half had been taken in his brother's name; but he admits that, upon his father's death, some twenty-four years ago, his mother claimed to be entitled to the land in question; and, although he says that he did not believe that she was entitled, he then made an agreement—or, rather, a series of agreements—with his mother, by which he occupied the property with her and maintained her upon the property, paying the taxes. He says he made this arrangement because he thought that his mother had a life interest—a statement which is quite inconsistent with the idea that he was the patentee. He also admits that he was the custodian of his mother's papers, and that he had the patent in his possession for all these years. He said that he did not read the patent until recently.

The defendant had acquired title to the west half by purchase from his brother; and during the twenty-four years the whole lot was worked, as it always had been, as one farm. The house was upon the east half, and the barn was upon the west half. A well was constructed upon the west half, close to the boundary. Over the well a windmill was erected; two of the legs of this windmill being planted upon the east side of the boundary. A road was laid out upon the centre line, half upon each side of it, and considerable money and labour was expended

upon making this road of value to both halves of the farm. Some clearing was done upon the east half, also some fencing.

I am unable to find that any of the improvements made were made under a mistake of title. I think it is obvious that for many years, probably ever since the father's death, the defendant has known the real position of the title. I am confirmed in this view by the defendant's own statement that he had arranged with his mother to make a will by which she would leave him this property, but that it had been put off from time to time, and had been finally neglected.

I think that some of the improvements made upon the property have increased its selling value, and that as a matter of fairness the defendant ought to be allowed a lien for this increased selling value.

I do not think that an allowance should be made for the road, as the proper inference from the evidence is, that this road was constructed upon an agreement between the defendant and his deceased mother which amounted to a dedication of the land used for the road, the purpose being to have a common way, serving both the east half and the west half. This may be so declared.

The fencing is an improvement of a permanent nature; so also is the draining.

The repairs to the house I do not think are in the nature of permanent improvements, but were mere repairs.

The replanting of the fruit trees, etc., is a trivial matter, and in the nature of ordinary husbandry.

No claim can be sustained for the pump, well, or windmill, these being on the west half. It was arranged at the trial that the legs of the windmill which rest upon the east half of the land should be allowed to continue as they are.

As to the increased value, the evidence was unsatisfactory. The witnesses entirely failed to apprehend the real question—that is, the increase of the value of the land by reason of the improvements. The defendant goes so far as to claim a sum greatly in excess of the cost. Giving the matter the best consideration I can, I think \$600 would be a fair sum to allow to cover all improvements made by the defendant.

There is no dispute concerning the defendant's right as to the \$143.05, being amounts paid since the death of Catherine

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McBride, for which a claim ought to have been sent in to the administrator.

The general rule is well stated in Halsbury's Laws of England, vol. 19, p. 19: "A person who has expended money for the benefit of another, or on property in which he has no interest, has, as a rule, no lien in respect of such expenditure against such other person or against the owner of the property"—a rule which is quite in accord with the recent decision of the Privy Council in *Dominion of Canada v. Province of Ontario (The Indian Treaty Case)*, [1910], A.C. 637, at p. 646, where it is stated that there is no right to recover "expenditure independently incurred by one party for good and sufficient reasons of his own," but which "has resulted in direct advantage to another." See also *Macclesfield Corporation v. Great Central R.W. Co.*, [1911] 2 K.B. 528.

To this general rule there is, I think, an exception, based upon the principle of estoppel. As stated in Halsbury's Laws of England, vol. 19, p. 21: "Where the owner of property stands by and allows a person to spend money thereon in the expectation that he will receive the benefit of it, such person is entitled to a lien" for the increased value resulting from the expenditure.

This principle was applied in a case by no means dissimilar from the present one, *Unity Joint-Stock Mutual Banking Association v. King* (1858), 25 Beav. 72, where a father owning certain property allowed his son to have possession of it and to make lasting improvements thereon. At that time he contemplated and intended at some future time to make over the lands to them; but he never did so. They were in truth mere licensees. The sons assumed to convey the lands to the bank from which they had borrowed the money. It was held by Sir John Romilly, M.R., that the father "could not have taken possession of that land again, without allowing to his sons the amount of money they had laid out upon it."

The same principle was acted upon in *Plimmer v. Mayor, etc., of Wellington* (1884), 9 App. Cas. 699—a case arising upon a statute which provided that in determining compensation "the . . . Court shall not be bound to regard strict legal rights only, but may award compensation in respect of any claim which the . . . Court may consider reasonable and just, having regard to all the circumstances."



*Ramsden v. Dyson* (1866), L.R. 1 H.L. 129, recognises both the rule and the exception which, I think, exists. There the estoppel rested upon the fact that the owner stood by and allowed the defendant to spend the money, knowing that he did so upon the mistaken belief that he owned the land.

I think that Sir John Romilly's decision justifies me in holding that the same principle applies where the expenditure is made upon the faith of a statement by the owner of his intention to give the land to the person making the improvement.

In the case in hand, the defendant says that his mother encouraged him to improve the place by telling him that he would ultimately have the benefit of his labour and expenditure; and, although I might not have been disposed to accept the defendant's own statements, because he was manifestly ready to shift his ground as he thought would best serve his purpose, yet the corroboration of his statements by disinterested witnesses leads me to accept them.

I do not think that the defendant is entitled to enforce his lien by retaining possession of the land. Judgment will, therefore, be for possession, and declaring that the defendant is entitled to a lien upon the land for the sum of \$600. A time—say three months from the date of the judgment—should be fixed for payment, in default of which payment the defendant ought to be at liberty to enforce his lien by sale.

The judgment will further declare that the road between the east and west halves has been dedicated as a way between both half lots. It may also be declared that the defendant is entitled to the \$143.05 as a creditor.

I think each party may well be left to pay his own costs.

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McINTYRE v. STOCKDALE.

Dec. 17

*Vendor and Purchaser—Contract for Sale of Land—Absence of Written Memorandum—Part Performance—Subsequent Conveyance by Vendor to Another—Specific Performance—Purchaser Deprived of Remedy by Act of Vendor—Judicature Act, secs. 41, 58 (10)—Damages in Lieu of Specific Performance.*

The defendant made a bargain with the plaintiff for the sale of land to him. There was no memorandum in writing, but the plaintiff went into possession, and was in possession at the time of the trial of this action, which was brought for specific performance of the agreement. The purchase-price was \$2,800; the plaintiff paid \$500 down, and made monthly payments for sixteen months at the rate of \$20 a month. A deed and a mortgage were prepared, but were never executed. The defendant resold the property at an advance, and conveyed it, and so deliberately put it out of his power to convey to the plaintiff:—

*Held*, that, although the contract would not before the Judicature Act have been enforceable at law, and was enforceable in equity only by the application of the doctrine of part performance, there was, by virtue of the Act, a binding contract in law as well as in equity; there was a breach of that contract by refusal to complete; and the plaintiff was entitled, in lieu of specific performance, to a return of the purchase-money paid and interest and to damages for the breach.

This was not by virtue of sec. 58, sub-sec. 10, of the Judicature Act, but by sec. 41, which gives to the High Court of Justice the jurisdiction possessed by the former Courts both of Law and Equity.

*Lavery v. Pursell* (1888), 39 Ch. D. 508, and *In re Northumberland Avenue Hotel Co.* (1886), 33 Ch.D. 16, 2 Times L.R. 210, distinguished.

*Elmore v. Pirrie* (1887), 15 L.T.R. 333, and *Ferguson v. Wilson* (1866), 15 L.T.R. 230, L.R. 2 Ch. 77, specially referred to.

Distinction noted between this case and a case such as *Hipgrave v. Case* (1885), 28 Ch.D. 353, where the plaintiff by his own act disentitles himself to specific performance.

ACTION for specific performance of an agreement for the sale by the defendant to the plaintiff of a house and lot in North Bay.

December 9. The action was tried before CLUTE, J., without a jury, at North Bay.

*J. C. W. Bell*, for the plaintiff.

*R. McKay*, K.C., and *G. A. McGaughey*, for the defendant.

December 17. CLUTE, J.:—There was no memorandum in writing, but I found as a fact that the plaintiff went into possession under the agreement, and is still in occupation of the house and premises.

The purchase-price was \$2,800; \$500 was paid down, and monthly payments were made for sixteen months at the rate of \$20 a month.

The deed and mortgage were prepared; but, the plaintiff having attended several times and the solicitors not being in, he neglected afterwards to attend and sign the papers. They never were in fact executed. There was some question raised as to whether the title was in the defendant or not, but the evidence clearly disposed of this point, and I found as a fact, at the close of the evidence, that the defendant, before he resold the property, was in a position to convey to the plaintiff, and that he was the real owner at the time of the agreement for sale, although he had agreed to give a portion of the purchase-money to his son as a gift, and the property stood in the son's name for a time.

The defence relied upon the case of *Lavery v. Pursell* (1888), 39 Ch. D. 508, where it was held that the jurisdiction to give damages in substitution for or in addition to specific performance has not been extended to cases where specific performance could not possibly have been directed; and, accordingly, the contract having, from lapse of time, become at the hearing incapable of specific performance, the equitable doctrine of part performance did not enable the plaintiff to obtain relief in damages.

The only point reserved at the trial was, whether this case applied, and would preclude the plaintiff from recovering damages from the defendant for resale of the property at an advanced price, subsequent to the sale to the plaintiff.

Chitty, J., in giving judgment in the *Lavery* case, puts the argument in this way (p. 518): "Part performance was an equitable doctrine, and, putting it shortly, where there was performance under the contract it took the case out of the statute, but it was an equitable doctrine applied by the Courts of Equity, and it was applied in those cases where the Court would grant specific performance, for instance, the case of a sale of land; but if, before the Judicature Act, the Court dismissed the bill because it was not a case for specific performance, a Court of Law, when asked to give damages, the contract not being within the 4th section, had no alternative but to refuse and to give judgment for the defendant in the action."

He then proceeds: "But since the various amendments which have taken place in the law with regard to equitable doctrines, it has never been decided, so far as I am aware, that the equitable doctrine of part performance can be made use of for the purpose

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of obtaining damages on a contract at law. I considered the question carefully in *In re Northumberland Avenue Hotel Co.* (1886), and that went to the Court of Appeal, 33 Ch. D. 16, 18, 2 Times L.R. 210. There it was impossible to give specific performance, because the subject-matter of the contract had come to an end; the Metropolitan Board of Works had entered, and the claimant—it was in a winding-up—could not claim specific performance. It was in that case argued strenuously on behalf of the claimant that he was still entitled to obtain damages, and I held that he was not (although there had been part performance by entry), and my decision was, as I understand, affirmed by the Court of Appeal. The result is that I adhere to that, and I point out that in this case, when the writ was issued, it was impossible to give specific performance. It was suggested that after Lord Cairns's Act the Court of Equity could give damages in lieu of specific performance. Yes, but it must be in a case where specific performance could have been given. It was a substitute for specific performance."

A reference to the facts in the *Lavery* case shews that at the time the action was tried the time for specific performance had passed, and it was there held that, as it would have been impossible to grant specific performance, the plaintiff could not recover damages in lieu thereof.

In *In re Northumberland Avenue Hotel Co.*, referred to in the last citation, the judgment of Chitty, J., was affirmed by the Court of Appeal, but not upon the ground that damages could not be given in lieu of specific performance. That question does not seem to have been referred to either in the argument or in any of the judgments in the Court of Appeal. It is true that Chitty, J., as a second ground, in his judgment states that, if there had been an agreement on which specific performance could have been originally decreed on the ground of part performance, there would not be any jurisdiction to give damages after specific performance had become impossible, but this was not necessary for the decision of the case, and is in no way confirmed by the Court of Appeal.

The argument upon which this view proceeds is, to my mind, wholly unsatisfactory, and at all events does not, I think, apply to the facts in the present case.

Here was a binding contract, made so by admitting the pur-



chaser into possession, where he resided for some sixteen months, and made payments upon the principal of the purchase-money, and was so credited by the defendant in a book kept by himself. The transaction was repeatedly confirmed by these payments, and the defendant did not deny in the box that it was an absolute sale by him, and it was merely an accident that the plaintiff did not sign the documents which were prepared. The defendant subsequently found an opportunity to resell the property at an advance, and actually offered the plaintiff \$100 for his loss. I cannot understand upon what principle the man should be relieved from the effect of his contract, which is binding upon him, simply because by his own wrong he places himself in a position where he cannot carry it out. Since the Judicature Act, there was a binding contract in law as well as in equity. There is a breach of that contract by refusal to complete; and I am of opinion that the plaintiff is entitled to recover damages for the breach, as well as a return of the purchase-money paid by him, with interest from the dates of payment.

The *Lavery* case was decided apparently having exclusive reference to Lord Cairns's Act, which corresponds to our Judicature Act, sec. 58, sub-sec. 10; but the Judicature Act vested in the High Court all the jurisdiction which, prior to the 22nd August, 1881, was vested in the Common Law Courts and the Court of Chancery. While Mr. Justice Chitty, in the *Lavery* case, incidentally refers to the Judicature Act, he does not point out the effect of the jurisdiction of the High Court additional to that possessed formerly by the Court of Chancery.

The effect of this enlarged jurisdiction is clearly set forth in the case of *Elmore v. Pirrie* (1887), 57 L.T.R. 333. It was there held that, under the Judicature Act of 1873, the Court has complete jurisdiction both in law and in equity; so that, whether the Court could in a particular case grant specific performance or not, it could give damages for breach of the agreement. This case does not appear to have been referred to in the *Lavery* case, although decided the year before. Kay, J., in the *Elmore* case, points out that Lord Cairns's Act somewhat enlarged the jurisdiction of the Chancery Court to grant specific performance, or to give damages in lieu thereof, to the extent pointed out by

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Lord Cairns himself in *Ferguson v. Wilson* (1866), 15 L.T.R. 230, L.R. 2 Ch. 77. Lord Justice Turner there said (L.R. 2 Ch. p. 88): "There were many cases where a Court of Equity would decline to grant specific performance, and yet the plaintiff might be entitled to damages at law; and great complaints were constantly made by the public, that when plaintiffs came into a Court of Equity for specific performance the Court of Equity sent them to a Court of Law in order to recover damages, so that parties were bandied about, as it was said, from one Court to the other. The object, therefore, of that Act of Parliament was to prevent parties being so sent from one Court to the other, and accordingly the Act provides that the Court may, either in addition to or in substitution for the relief which is prayed, grant that relief which would otherwise be proper to be granted by another Court. But that Act never was intended, as I conceive, to transfer the jurisdiction of a Court of Law to a Court of Equity." And Lord Cairns (then Sir H. M. Cairns, L.J.) said (p. 91): "In all cases in which the Court of Chancery has jurisdiction to entertain an application for the specific performance of any covenant, contract, or agreement.' That, of course, means where there are, at least at the time of bill filed, all those ingredients which would enable the Court, if it thought fit, to exercise its power and decree specific performance—among other things, where there is the subject-matter whereon the decree of the Court can act."

Kay, J., in *Elmore v. Pirrie*, after referring to the cases (*Ferguson v. Wilson* (*supra*), *Soames v. Edge* (1860), John. 669, and *Middleton v. Greenwood* (1864), 2 DeG. J. & S. 142), points out (57 L.T.R. at p. 335) that the Judicature Act of 1873 gave the Court a power which it did not possess before—"that is to say, it gave the Court complete jurisdiction both in law and equity; so that, whether the Court could in a particular case grant specific performance or not, it could give damages for breach of the agreement; *à fortiori*, if the contract was one as to which the Court had the right to exercise its jurisdiction to grant specific performance of it, the Court could grant damages for breach of it; so that the Court had now a much larger power than it had under Lord Cairns's Act, for under that Act the plaintiff had first to make out that he was entitled to an equitable remedy before he could

get damages at all. Now, however, the plaintiff might come to the Court and say, 'If you think I am not entitled to specific performance of the whole or any part of the agreement, then give me damages.' That was the jurisdiction of the Court when the Judicature Act was passed."

This is, in my opinion, the true effect of the changes in the law. It is not by virtue of sec. 58, sub-sec. 10, of the Judicature Act, that the jurisdiction covering the present case was determined, but sec. 41, which gives to the High Court the jurisdiction possessed by the former Courts both of Law and of Equity. This is the view I expressed at the close of the plaintiff's case, and it is confirmed by a further consideration of the effect of the changes of the law bearing upon the question. See also Fry on Specific Performance, 5th ed. (Canadian Notes), p. 639.

I think there is a distinction where the plaintiff by his own act disentitles himself to specific performance, as in *Hipgrave v. Case* (1885), 28 Ch. D. 356, and where, as here, the defendant commits the wrongful act which deprives the plaintiff of the rights arising under his contract.

The plaintiff is, therefore, entitled to a return of his purchase-money and interest thereon from the date of payment, and also damages for the breach of contract.

As to the amount of damages, the evidence was not very clear or satisfactory; the plaintiff claiming too much and the defendant, I think, conceding too little. I assess the damages at \$200, with the right to either party to take a reference, at his peril as to costs, either to increase or reduce this amount, before the Master at North Bay. The plaintiff is entitled to full costs of action.

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## [DIVISIONAL COURT.]

D. C.

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Dec. 21

## CONNOR V. "THE PRINCESS THEATRE."

*Animals—Injury from Bite of Trained Monkey—Keepers or Harbourners—  
Evidence — Liability for Act of Naturally Wild and Mischievous  
Animal.*

An infant was bitten by a trained and performing monkey, which was tied up in a yard adjoining the premises of the defendants, in the interval between performances given in the defendants' theatre; and the infant and his father sued for damages caused by the injury:—

*Held*, upon the evidence, that the defendants did not keep or harbour the monkey, and were not responsible for its misconduct or mischief. They could not be accounted keepers or vicarious keepers, unless when the monkey was actually upon their own premises.

Discussion of the law and authorities upon the question of the responsibility for keeping or harbouring animals naturally wild and mischievous which have been trained to serve some purpose for the use of man.

APPEAL by the plaintiffs from the judgment of the Senior Judge of the County Court of the County of Wentworth, dismissing an action brought in that Court by Harry Hartley Connor, an infant, by his next friend, Samuel A. Connor, and the said Samuel A. Connor, as plaintiffs, against "The Princess Theatre," defendants.

The statement of claim was as follows:—

1. The plaintiff Harry Hartley Connor is the infant son of the plaintiff Samuel A. Connor, who is a waiter residing at the city of Hamilton, and the defendants Jack Buckel and Charles Montague the owners and proprietors of what is known as "The Princess Theatre," at No. 108 James street north, in the said city of Hamilton.

2. The plaintiff Samuel A. Connor, with his wife and his said infant son, resides with John Gill, who carries on a restaurant business at No. 110 in the same street, the said John Gill being a brother-in-law of the plaintiff Samuel A. Connor.

3. The defendants carry on business at No. 108 James street north, being the premises immediately adjoining the said Gill's premises on the south; and, since the lease under which the said Gill is holding the premises No. 110 was first given (July, 1907), the defendants have extended their building back within two or three feet of the end of their premises.

4. The defendants carry on a combination moving picture



and vaudeville show; and, prior to the extension of the building as aforesaid, used the back end of their property for keeping chattels or any animals used in connection with the theatre performances. Since the extension, the defendants have been in the habit of using the premises of the said Gill for such purposes. The premises No. 112 and No. 114 James street north have been extended back to the back end of the property, leaving a yard at the back end of the Gill premises about 15 or 18 feet wide by about 70 feet in length.

5. On or about the 1st day of June, 1912, the defendants brought upon their premises a monkey for the purpose of being used in connection with some of the theatre performances, and caused it to be tied by a chain of considerable length to the leg of a table which was standing in the yard of the said Gill.

6. The infant plaintiff was going from the back end of the premises of the said Gill towards the house or store of the said Gill, when the monkey jumped off the table and bit him severely about the arm, causing blood-poisoning to set in, and requiring that the said infant should be taken to the hospital and there treated.

7. The infant plaintiff suffered great pain and distress of mind, and the said arm has been permanently injured, and the said Samuel A. Connor has been put to medical and other expense in the treatment of the said injury.

8. The plaintiffs charge that the defendants are liable to the plaintiffs for bringing upon their premises, and the premises used in connection therewith, an animal ferocious by nature, the same having inflicted personal injury upon the infant plaintiff and consequent loss upon the adult plaintiff.

The plaintiffs, therefore, claim: (1) the sum of \$2,000 damages; (2) their costs of this action; (3) such further and other relief as the nature of the case may require.

The defence was a denial of the material allegations of the statement of claim.

The action was dismissed at the trial, and the plaintiffs appealed.

December 16. The appeal was heard by a Divisional Court composed of BOYD, C., LATCHFORD and MIDDLETON, JJ.

A. M. Lewis, for the plaintiffs, argued that the defendants

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were clearly liable for the damage done by the monkey. They knew that the animal had been tied in the yard, and that they had no right to allow it to be fastened there. He referred to Pollock on Torts, 9th ed., pp. 498, 499, 500, 501, 511, and 572; *May v. Burdett* (1846), 9 Q.B. 101; *Baker v. Snell*, [1908] 2 K.B. 352, 825.

*H. McKenna*, for the defendants, contended that the judgment of the learned trial Judge was right and should be affirmed. The defendants owned neither the animal nor the premises on which it was tied, and so no liability attached to them: *Bradd v. Whitney* (1907), 9 O.W.R. 656.

*Lewis*, in reply.

December 21. *BOYD, C.*:—The plaintiffs sue for damages resulting from the bite of a monkey, which, it is alleged, was brought upon the premises of the defendants and the premises used in connection with their theatre. The evidence shews that the defendants had engaged a woman who travelled with a performing monkey to give an exhibition for three days in their theatre in Hamilton. On the second day, it appears, the monkey had been tied in the yard of a restaurant which abutted on the rear part of the theatre, in which from time to time certain property not used or needed by the theatre was left loosely scattered about. No license so to use the yard was proved, and it is not suggested that the theatre had any control over or interest in this yard. As a matter of accommodation probably, the restaurant-man who owned the yard did not object to its occasional use. There was a cement walk giving access to the rear part of the theatre, and this yard, unfenced, lay alongside that back entrance. The boy, who with his father lived with the restaurant-keeper (a relative), was going through the yard, and the monkey, who was chained to the leg of a table in the yard, sprang at the lad and bit him severely in the arm.

A contract was put in, made by the Griffin Vaudeville Circuit of Toronto, and at Toronto, on the 23rd May, 1912, with the possessor of this monkey for the performance of a "Novelty Act" at the Princess Theatre of Hamilton on three days, the 30th and 31st May and the 1st June.

The manager of the defendants first knew of or saw the

monkey on the forenoon of the first day, when there was a sort of rehearsal in his presence to see if the performance was satisfactory for his patrons in the afternoon.

The hours of performance and of attendance by the performers at the theatre were from 1.45 to 5 p.m. of each day. For the rest of the day the defendants had no control over the performer. On Friday the manager saw the monkey tied in the yard, and on Saturday morning the boy was bitten.

Proof is made that a lot of ladders and stuff such as boxes used at the show generally were pitched into the yard; that performing dogs were on occasion cleaned and exercised in the yard; and that some monkeys were in the yard once before. But, as to these occasions and the one in question, it does not appear whether it was the particular travelling troupe or the particular performer that so used the yard: the proper inference from the whole evidence is, that the theatre people did not interfere or sanction or direct such use. They did not object to it and they did not consent to it. Upon such evidence, can it be said that they kept or harboured the monkey or were in any sense responsible for its misconduct or mischief? They had no control over the yard and no control over the performer except during the intervals when he was within the precincts of the theatre—and this yard was not a part of these precincts.

To advert shortly to the law.

Animals have been classified as: ferocious, dangerous, mischievous, and harmless. The first three are of wild nature, *feræ naturæ*, the last *mansuetæ naturæ*, of tame and gentle disposition, either naturally so or because they have been tamed and made subservient to the use of man.

There is a special class naturally wild and mischievous which have been trained to become performing animals, such as bears and monkeys, and these it may be lawful to keep and use for the purpose of gain or amusement; whereas in the case of ferocious beasts the keeping of these is by some judges accounted a wrongful act which makes the keeper responsible for any injury inflicted by them without proof of negligence. See *Baker v. Snell*, [1908] 2 K.B. 352, and in appeal 825. This was so held in the case of a monkey in *May v. Burdett*, 9 Q.B. 101, and it was put on the ground that a person keeping a mischievous animal, with knowl-

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edge of its propensities, is bound to keep it secure at his peril, and that, if it does mischief, negligence is to be presumed without express averment.

The law may not be so now in the case of trained animals which have been trained to serve some purpose for the use of man; a phase of the law referred to in *Harper v. Marcks*, [1894] 2 Q.B. 319, which is not cited in the case in 1908.

In the present case of a trained and performing monkey, I incline to think that the better rule is propounded by Mr. Cooley in his book on Torts: "When wild animals are kept for some purpose recognised as not censurable, all we can demand of the keeper is that he shall take that superior precaution to prevent their doing mischief which their propensities in that direction justly demand of him:" 3rd ed., vol. 2, paragraph 411.

The situation is well stated by Platt, B., in *Jackson v. Smithson* (1846), 15 M. & W. 563, 565: "No doubt a man has a right to keep an animal which is *feræ naturæ*, and nobody has a right to interfere with him in doing so, until some mischief happens; but as soon as the animal has done an injury to any person, then the act of keeping it becomes, as regards that person, an act for which the owner is responsible." (S.C., 15 L.J. Ex. 311). Not only is the owner liable, but so is any one who keeps or harbours the beast upon his premises. The law in this aspect was discussed in *Shaw v. Creary* (1890), 19 O.R. 39, and in an almost contemporaneous case in New Brunswick, *Wood v. Vaughan* (1889), 28 N.B.R. 472. See *Gardner v. Hart* (1896), 44 W.R. 527, where an innkeeper was made liable in whose premises the dangerous beast was kept, though the owners also lived there.

But in this case the defendants can in no way be accounted keepers or vicarious keepers of the monkey, unless when the monkey was actually in or upon their premises.

I may note the incisive criticism of the case of *Baker v. Snell* by Mr. Beven in 22 Harvard Law Review, p. 465, and the incisive counter-criticism of Mr. Beven by Sir F. Pollock in 25 Law Quarterly Review, p. 317.

Whatever may be the ultimate view, there is no doubt that in this case the monkey was improperly placed and insecurely fastened; and whoever put it there failed in that superior degree of care which the mischievous propensities of the animal called for.



The Judge rightly concluded in the case in appeal that no blame attached to the defendants, and the action was rightly dismissed.

It is not a case for costs.

MIDDLETON, J.:—I agree.

LATCHFORD, J.:—"If I put in motion a dangerous thing, as if I let loose a dangerous animal, and leave to hazard what may happen, and mischief ensue to any person, I am answerable in trespass." Lord Ellenborough, C.J., in *Leame v. Bray* (1803), 3 East 593, 595. It is not essential to liability that the defendant should own the animal. If a person harbours a dangerous animal or allows it to be at and resort to his premises, that is sufficient: *McKone v. Wood* (1831), 5 C. & P. 1. In *May v. Burdett*, 9 Q.B. 101, an action brought by the husband of a woman who had been bitten by a monkey, Lord Denman declares that the liability is put upon the true ground by Lord Hale in 1 Pleas of the Crown, 430 (b): "Though the owner have no particular notice of the quality of his beast . . . that he did any such thing before, yet if it be a beast . . . *feræ naturæ*, as a lion, a bear, a wolf, yea an ape or monkey, if he get loose and do harm to any person, the owner is liable to an action for the damage, and so I knew it adjudged in *Andrew Baker's Case*, whose child was bit by a monkey, that broke his chain and got loose."

*May v. Burdett* was approved recently in the remarkable case of *Baker v. Snell*, [1908] 2 K.B. 352, which was sustained on appeal: *ib.* 825.

Here, however, it is sought to attach liability, not to the owner or keeper of the mischievous animal, but to the managers of the theatre where the owner was engaged for a few days. The premises on which the monkey was when it bit the infant plaintiff were not the premises of the defendants nor under their control. The utmost length to which the evidence on the point goes is, that the defendants knew that certain performers used the yard occasionally to store their paraphernalia, and also knew that the owner of the monkey had tied the animal on the day prior to the accident to a table in the yard. No right so to use the yard was in the defendants or the performers. The animal was upon the premises of the restaurant-keeper. It was not kept or harboured by the defendants, and no liability attached to them.

The appeal fails and must be dismissed. It is not, I think, a case for costs.

*Appeal dismissed without costs.*

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## [DIVISIONAL COURT.]

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Oct. 22

Dec. 23

## RE JOHNSON.

*Will—Construction—Bequest of Personality to Widow—Life Interest with Power to Enroach upon Capital for Maintenance.*

The testator made his will in June, 1909, and died in August, 1911; there was no change in his financial circumstances in the interval. He left a widow and grown-up children—married and doing for themselves. His wife was, at the date of the will, weak and with failing eyesight; in 1912, she was old, infirm, and stone-blind. His estate consisted of land, with house and its belongings, and notes, mortgages, and money amounting to about \$7,000. He gave the whole of his property, real and personal, to his wife for life; after her death, the house and furniture, live stock and chattels, to one of his daughters; and after the wife's death legacies to various sons, amounting in the whole to \$3,200—the legacies to be paid forthwith "if there is sufficient funds to pay the same;" and, if not, a corresponding deduction was to be made in every case. All the residue of the estate was given among the daughters:—

*Held*, that the widow took a life estate and interest in all the property, with an implied contingent power to enroach on the capital for the purposes of maintenance: this was a fair and reasonable conclusion to be drawn from the language of the will, construed in the light of the surrounding facts known to the testator when he made his will and at the time of his death.

*Re Dixon* (1912), 56 Sol. J. 445, and *In re Holden* (1888), 57 L.J. Ch. 648, distinguished.

*In re Thomson's Estate* (1879-80), 13 Ch.D. 144, 14 Ch.D. 263, followed. Judgment of MULOCK, C.J.Ex.D., varied.

APPLICATION by the widow of William Johnson, deceased, for an order determining a question arising upon the construction of the will.<sup>e</sup>

October 21. The application was heard by MULOCK, C.J. Ex. D., in the Weekly Court at Toronto.

*N. B. Tudhope*, for the applicant and one of the executors.

*D. Inglis Grant*, for Janet Ratcliffe, one of the daughters of the testator.

October 22. MULOCK, C.J.:—This is an application for the construction of the will of the testator, William Johnson; and the question is, what interest the testator's widow takes in that portion of his personal estate described in his will as "all my money, notes, and mortgages." She claims to be entitled to it absolutely, whilst the daughter's contention is, that she takes but a life interest in it.

The will is as follows: "I give devise and bequeath all my real and personal estate . . . in the following manner . . . I

give devise and bequeath unto my wife Agnes Johnson my house and lot in Rugby . . . together with all my money, notes, mortgages and all my real and personal estate of every nature and kind whatsoever of which I may die possessed or interested in at the time of my decease for the term of her natural life she remains my widow . . . In the event of her remarriage or death then the following legacies shall be paid forthwith if there is sufficient funds to pay the same . . .” Then follows a list of specific, pecuniary legacies. Then the will proceeds: “From and after the remarriage or death of my wife Agnes Johnson I give devise and bequeath my said house and lot together with furniture, household furnishings and effects or any live stock and chattels, to my oldest unmarried daughter . . . If at the time of the remarriage or death of my wife my daughters are all unmarried, then my said property shall be sold and proceeds of sale divided equally among my daughters then living. All the residue of my estate of every nature and kind not hereinbefore disposed of, I give devise and bequeath unto my daughters equally share and share alike. If an unmarried daughter comes into possession of my house and lot at Rugby, at her marriage or death, if she is still possessed of it, it shall go into possession of my next oldest unmarried daughter, and so on whilst any of the unmarried daughters are alive.” Then follows the appointment of executors.

I am unable to see how, under the language of this will, the widow is entitled to the corpus of the “money, notes, and mortgages.” The testator, in the first clause, gives her his house, together with the moneys, notes, etc., “for the term of her natural life she (*sic*) remains my widow.” Doubtless the word “whilst” was intended to precede the word “she”. On her death (an event which must happen) or remarriage, the house is disposed of in remainder. In the event of the widow’s death or remarriage the pecuniary legacies are to take effect. By the same set of words, the testator gives his widow the house and “my money, notes, and mortgages,” not absolutely, but at longest for the term of her natural life. These words would be meaningless if she took the money, notes, etc., absolutely: *In re Thomson’s Estate* (1879), 13 Ch. D. 144; affirmed (1880), 14 Ch. D. 263. That the testator did not so intend is further shewn by the provision that “in the event of her remarriage or death then the following legacies shall

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be paid forthwith if there is sufficient funds to pay the same." The widow taking the personalty absolutely would defeat this provision. Then from and after the marriage or death of his wife, the testator gives the house, furniture, household furnishings and effects, live stock and chattels, to his oldest unmarried daughter. The gift to his wife of all his money, notes, and mortgages and all his "real and personal estate," for the term of her natural life, would, unless cut down by other words, include his furniture, etc.; but the gift over of the furniture, etc., to a daughter, after his wife's death or remarriage, shews that the widow was not to take furniture, etc., absolutely, but only during her lifetime at farthest, and leads to the same construction as to her interest in his "money, notes, and mortgages." Further, the testator contemplated a residue after the widow's death or remarriage and after the payment of the legacies; and this residue he disposes of by the residuary clause of his will: "All the residue of my estate of every nature and kind not hereinbefore disposed of, I give devise and bequeath unto my daughters equally share and share alike," etc. If the widow took all his personalty absolutely, there would be no residue.

The will, as a whole, makes clear the testator's scheme for disposing of his estate, namely, to give an interest to his wife during her natural life, or until her remarriage, and thereafter to distribute the estate amongst his children.

For these various reasons, I am of opinion that the widow is entitled to a life interest only in the testator's "money, notes, and mortgages." Mr. Tudhope stated that this was the only question upon which the opinion of the Court was desired.

The application was a proper one, and the costs of all parties should be paid out of the estate.

The widow appealed from the judgment of MULOCK, C.J.

December 19. The appeal was heard by a Divisional Court composed of BOYD, C., LATCHFORD and MIDDLETON, JJ.

*N. B. Thudhope*, for the appellant, argued that the widow was entitled not only for life but absolutely. If there should be anything left at the widow's death, then only would the other beneficiaries receive shares. He referred to *Re Rowland* (1902), 86



L.T.R. 78; *In re Walker*, [1898] 1 I.R. 5; *Re Story* (1909), 1 O.W.N. 141.

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*D. Inglis Grant*, for Janet Ratcliffe, contended that the judgment appealed from was right. The widow had only a life estate, and had no right to diminish the corpus. In support of this contention, he cited *Re Dixon* (1912), 56 Sol. J. 445; *Re Cotterill* (1911), 2 O.W.N. 745; *Re Adam's Trusts* (1865), 13 L.T.R. 347; *In re Brooks's Will* (1865), 34 L.J. Ch. 616.

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*Tudhope*, in reply.

December 23. The judgment of the Court was delivered by BOYD, C.:—The testator made his will in June, 1909, and died in August, 1911; his financial condition between these two years being much the same.

He left a widow and grown-up children—married and doing for themselves. His wife was, at the date of the will, weak and with failing eyesight—she is now old, infirm, and stone-blind. After paying debts, his estate consists of land, with house and its belongings, and personal property. The latter is chiefly made up of mortgages aggregating \$4,400, notes amounting to \$1,125, and money equal to \$1,550, in all about \$7,000, yielding (say) \$350 a year.

The frame of his will is to give the whole of his property, real and personal, to his wife for life or widowhood (this last alternative may be dismissed.) After her death, the house and furniture and any live stock or chattels are to go to one of the daughters; and after the wife's death legacies are to be paid to various sons, amounting in the whole to \$3,200; and this clause contains the crucial words: At her death, then, "the . . . legacies shall be paid forthwith if there is sufficient funds to pay the same; if not, then a corresponding deduction shall be made in every case." All the residue of the estate is given among the daughters.

Upon the construction of the will the Chief Justice has held that the widow has a life estate only and not an out-and-out ownership. I agree that this is a right result, but would carry the benefit intended for the widow a little further, and say that she has a life estate and interest in all the property, with an implied contingent power to encroach on the capital for the purposes of maintenance. This aspect of the case was not presented to or

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considered by the Chief Justice, but it is a fair and reasonable conclusion to be drawn from the language of the will, construed in the light of the surrounding facts known to the testator when he made his will and at the time of his death.

He knew that his wife would need support and maintenance, and he left her all his property for her life for that purpose. He also knew that the income of the estate, while enough perhaps for a woman able to fend for herself, would be insufficient for one blind and infirm, and he knew that, after paying debts, he would leave plenty of easily available property, which he refers to as "funds," to pay the \$3,200 legacies in full, if that available property were not diminished by being drawn upon. Under the terms of this will, the widow is entitled to enjoy the whole property in specie and the money in her hands and coming into her hands from the notes and mortgages so much as she might need to apply for the satisfaction of her own proper wants. Such, it appears to me, is the only satisfactory explanation to be given of the language used by the testator. The income of \$350 is not enough; rather would about \$600 be required per year to have this blind woman properly looked after and supported. To this extent, a measurable extent, is the widow permitted to exercise power to encroach upon the moneys of the estate.

The case-law is in a somewhat confused condition upon this branch, yet many decisions support this conclusion.

The most recent case cited, *Re Dixon*, is not of authority because only found in the Sol. J., vol. 56, p. 445 (February, 1912), by Mr. Justice Neville. The will was of all the man's estate to his wife during widowhood, and at her death or remarriage the *residue* to be divided between children. The Judge held that "residue" had the same meaning as "remainder," used and construed in a will before Mr. Justice Kay, *In re Holden*, and followed him in declaring that the widow had a life estate only. This throws us back to consider *In re Holden* (1888), 57 L.J. Ch. 648, which cannot be regarded as a satisfactory decision. The will gave the personal estate to the widow for her own use as long as she might live, and on her death directed that the remainder of the personal estate which might then exist should be made money and given to brothers and sisters. It was argued that the words "remainder which may then exist" implied some

power of disposition during her life. Kay, J., said: "Did the testator mean to give his wife more than a life estate? I confess I strongly suspect that he did. The words" (as to remainder) "look as if he were contemplating a diminution of capital; but I cannot act upon mere suspicion. The words are intelligible if you refer them to the first direction in the will to pay his debts. His wife was an executrix, and it might be that she would have to go on paying debts during her life, and I think the word 'remainder' is sufficiently explained by that direction to pay debts."

There is no such outlet in the case in hand, for the wife was not appointed an executrix, and the debts were too small to affect the sufficiency of the funds for paying legacies. And, besides, such a method of construction was not favoured in *In re Willatts*, [1905] 1 Ch. 378, [1905] 2 Ch. 135.

There the testator had appointed his wife executor with power to sell all his property and land, and at her death what is left to be divided between his daughters. Farwell, J., held that the words "what is left" meant the net residue of the estate after payment of debts and costs of realisation, and did not give the wife a life or any other interest in the estate. This was reversed by the Court of Appeal, who held that the reference was not to what remained after payment of debts, but what should be left after the exercise by the plaintiff for her own benefit of her power of sale.

On the other hand, there is a case decided in 1902, *Re Rowland*, 86 L.T.R. 78, by Eady, J., where the bequest of residue was for the sole use and benefit of the wife during widowhood. Should she marry, then the balance, if any, of the money and farm stock, not to exceed £400, to be divided between others. She married; and it was held that she took absolutely all except as to £400, which went over in the event of there being a balance of any unexpended residue to that amount on the day of remarriage. It was argued there that "balance" meant what was left after providing for debts, but it was held that "balance" meant the part unexpended by the widow.

This decision appears to go farther than is supportable, but it is upheld by the last editor of Jarman, as decided on the principle that property may be given for life with a power to expend capital, followed by a valid gift over of the unexpended part: vol. 1,

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p. 464 (note z), 6th ed. (1910). At one time that was thought to be so indefinite and vague as to be nugatory and ineffective, and so was rejected by the Court.

I think the correct rule applicable to the case in hand is to be found in the words of James, L.J., in *In re Thomson's Estate* (1880), 14 Ch. D. 263, 264. He says: "The widow took nothing but an estate for life with a full power of enjoying the property in specie, so that if there was ready money it need not be invested, but she might spend it, and she might use the furniture and enjoy the leaseholds in specie."

The same reason in this case extends to the use of the notes and mortgages—not absolute and unlimited, but having regard to the need of the widow. The testator does not contemplate the disposition of all the funds available for legacies, but some diminution of it, which is in reason and good sense to be measured and controlled by the executor. The testator speaks of "funds" in the popular sense of assets presently available for the payment of legacies, and in this instance to be drawn first from the money in hand, then from the notes as they fall due, and then from the mortgages, which run for some years. These funds may be drawn upon for the necessities of the widow, as already indicated.

A Nova Scotia case deserves mention, *Re McDonald* (1903), 35 N.S.R. 500. Testator gave his wife all the estate for her own use during her lifetime. At the death of the wife, he gave the house and contents to another for life, and to his nephews thereafter, as well as any money or securities which may remain "after the death of wife." It was decided by Townshend, J., and affirmed by Justices Ritchie, Graham, and Meagher, that the wife was entitled to more than the income, and had a right to use a part, if not the whole, of the principal. And the question submitted was approved of, viz., that, if the income was insufficient for the maintenance and support of the widow, the executors would be justified in allowing her as much out of the principal of the personal property as might be necessary therefor.

That case appears to be singularly like this, and, though not an authority in this Province, is a valuable exposition of the law. See, also, *In re Tuck* (1905), 10 O.L.R. 309.

With this variation of the judgment, the matter will be left in the hands of the executors to deal with as now indicated.

Costs of appeal out of estate.



## [DIVISIONAL COURT.]

## TOWNSEND V. NORTHERN CROWN BANK.

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Dec. 24.

*Banks and Banking—Securities Taken by Bank from Customer—Sawn Lumber—"Wholesale Purchaser"—"Products of the Forest"—"And the Products thereof"—Bank Act, sec. 88(1)—Assignment for Benefit of Creditors—Securities Given within Sixty Days—Continuation of Former Securities—Assignment of Building Contracts—Assignment of Book-debts.*

The judgment of MEREDITH, C.J.C.P., 26 O.L.R. 291, was affirmed, upon appeal by the plaintiff and cross-appeal by the defendants to a Divisional Court, with one variation, viz., that, in so far as the book-debts assigned to the defendants represented materials pledged to them, they were, as against the plaintiff, entitled to follow the proceeds.

*Molsons Bank v. Beaudry* (1901), Q.R. 11 K.B. 212, not followed.

APPEAL by the plaintiff and cross-appeal by the defendants from the judgment of Sir William MEREDITH, C.J.C.P., 26 O.L.R. 291.

October 7. The appeal was heard by a Divisional Court composed of MULOCK, C.J.Ex.D., CLUTE and RIDDELL, JJ.

*W. Laidlaw*, K.C., for the plaintiff, argued that Brethour, the insolvent debtor, was not a wholesale dealer in lumber: *Treacher v. Treacher*, [1874] W.N. 4. The lumber, product of lumber, and proceeds thereof, in question in the action were not the product of the forest: *Molsons Bank v. Beaudry* (1902), Q.R. 11 K.B. 212. The renewals of all preferential liens on lumber and product and proceeds thereof were void as against the plaintiff: *Bank of Hamilton v. Halstead* (1897), 28 S.C.R. 235; *Bank of Hamilton v. Shepherd* (1894), 21 A.R. 156. The law did not allow substitution of lumber and renewal of securities for lumber under the provisions of the Bank Act. The securities for lumber and the advances must be contemporaneous. The alleged preferential securities were given by Brethour within sixty days before the date of the assignment.

*F. Arnoldi*, K.C., for the defendants, contended that Brethour was a wholesale dealer within the meaning of the Act, and that the lumber in question was a product of the forest. It was quite competent for the bank to follow the proceeds of the sale of the goods: *Union Bank of Halifax v. Spinney* (1906), 38 S.C.R. 187. Upon the cross-appeal, it was contended that the defendants

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were entitled to so much of the book-debts assigned to the bank as represented sales of lumber pledged to the bank, and to all moneys payable under the Johnson and Saunders contracts.

*Laidlaw*, in reply, argued that the defendants had abandoned at the trial the claims made on their cross-appeal.

December 24. MULOCK, C.J.:—The plaintiff's grounds of appeal in substance are as follows:—

1. That the debtor, Brethour, was not a "wholesale purchaser" within the meaning of sec. 88, sub-sec. 1, of the Bank Act, R.S.C. 1906, ch. 29.

2. That the lumber in question was not "products of the forest."

3. That the note in respect of which the bank claims to be entitled to the securities claimed, was not negotiated by the bank.

Sub-section 1 of sec. 88 is as follows: "The bank may lend money to any wholesale purchaser or shipper of or dealer in products of agriculture, the forest, quarry and mine, or the sea, lakes and rivers, or to any wholesale purchaser or shipper of or dealer in live stock or dead stock and the products thereof, upon the security of such products or of such live or dead stock and the products thereof."

Dealing with the first question, the evidence shews that Brethour bought lumber in car-load quantities, storing it in his yard, where he would have at times from two to three hundred thousand feet. The lumber thus purchased was partly used by Brethour in filling building and other contracts and carrying on his own business generally, and partly disposed of by sales in small quantities to the general public. This business was carried on in a small village in an agricultural district, and the transactions were comparatively small; but, still, Brethour's purchases were in their nature wholesale, and I am of opinion that as a matter of fact he was a "wholesale purchaser."

The second objection, that lumber is not the "product of the forest," within the meaning of the sub-section, was dealt with in *Molsons Bank v. Beaudry*, Q.R. 11 K.B. 212, where the Court (Hall, J., dissenting) affirmed the judgment of Curran, J., who held that lumber was not a "product of the forest." It was argued before us that, at most, the log only was a "product of the

forest," and that, when the log was sawn into lumber, the lumber became the product of the mill and not of the forest. The section, I think, is not open to so narrow a construction.

In enumerating the classes of goods, etc., upon which the bank may lend, the section uses the words "agriculture," "forest," "quarry," "mine," "sea, lakes and rivers," etc., as indicating the original source of such goods, etc., not the means whereby they are produced; and the lumber produced from the sawing of the log has not thereby, in my opinion, ceased to be a product of the forest. It is not necessary here to lay down any general definition of the word "products," as used in the sub-section, it being sufficient for the purposes of this appeal to deal with what is the issue in question.

Beginning then with the standing timber, does it, when felled and sawn into lumber, remain a product of the forest within the meaning of the sub-section?

It is common knowledge that manufacturers of lumber, as a rule, own the limits whence they derive their logs, and that their usual method of carrying on the lumber industry is to cause the standing timber to be felled, cut into logs, and sawn into lumber, sometimes in mills on the limits and sometimes elsewhere, the lumber thus produced being the outcome of the lumber industry as ordinarily carried on, and being in substance the first result of the application of labour to the standing timber or to windfalls. If the application of labour to the timber when in a state of nature robs it of the character of "products of the forest," then the Act contemplates the bank lending only on timber in a state of nature. Like reasoning as to the "products of the sea, lakes and rivers," would limit lending on fish either to those enjoying their liberty or dead ones in the water, a security in either case hardly contemplated by Parliament. So as to the "products of agriculture." The farmer sows, cuts, gathers, and threshes his grain, sometimes with his own power, sometimes with hired power. Is the standing grain a product and threshed grain not a product of agriculture? The question, I think, answers itself.

In using the word "products," Parliament did not, I think, intend to limit its use to things in a state of nature, but to include those to which some labour had been applied. To what extent is not necessary here to determine, but certainly, I think, to the

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extent of enabling the particular industry of lumbering to produce lumber and the farmer to produce grain. I, therefore, think the second ground of appeal fails.

As to the third objection. The plaintiff's contention is, that the goods claimed by the bank were pledged in respect of prior notes made by Brethour, which had been surrendered to him in exchange for renewal notes, and that such renewal notes were not "negotiated" within the meaning of the Bank Act. Brethour's indebtedness grew out of a credit of \$7,000 given by the bank to him, and which he agreed collaterally to secure on certain goods, under the provisions of sec. 88 of the Bank Act. The bank from time to time discounted Brethour's notes, taking with each note a pledge of the goods. When a note became due and was renewed, the goods were again pledged in respect of the renewal note, and the old note was surrendered. The giving of such security was in accordance with the understanding of the parties when the original credit was given; and the inference is, that the bank would not have surrendered a secured note when due unless the security was continued in respect of the renewal; and that such was the view of both parties is evidenced by the fact that each renewal note was similarly secured.

On the surrender by the bank of an overdue note and the security held therefor, on the understanding that it was to receive in exchange therefor a renewal note similarly secured, such exchange was a valuable consideration, and constituted, in my opinion, a negotiation of the renewal note, and supported the security in respect thereof: *Bank of Hamilton v. John T. Noye Manufacturing Co.* (1885), 9 O.R. 631. I, therefore, am unable to give effect to the third ground of appeal, and think the plaintiff's appeal should be dismissed.

The defendant bank, by cross-appeal, claims to be entitled to so much of the book-debts assigned to the bank as represents sales of lumber pledged to the bank, and to all the moneys payable under the Johnson and Saunders contracts. It appears from an examination of the notes of the trial that the cross-examination of Brethour concluded with a reference to the "contracts of Saunders and Johnson," whereupon the plaintiff's counsel began his re-examination thus: "Take, for example, the larger contract; the Johnson contract was the larger?" And, after a few questions



regarding the method of working it out, counsel for the bank intervened, saying: "It might facilitate matters if I say the bank does not claim anything that does not represent materials taken from the yard." That statement, having regard to the context, applies, I think, to both the Johnson and the Saunders contracts; and the learned trial Judge has declared the bank entitled to payment out of those contracts in respect of the pledged materials, thus giving the bank all it claimed at the trial in respect of the Johnson and Saunders contracts. It cannot now recede from that position and claim all the moneys payable under those contracts. I, therefore, think that that portion of the cross-appeal should be dismissed.

As to the cross-appeal in respect of the book-debts, the learned trial Judge was apparently of opinion that at the trial the bank had abandoned any claim to the book-debts; but the notes of the trial do not support this view. To the extent that these book-debts represent materials pledged to the bank, the latter is, I think, as against the plaintiff (a mere volunteer), entitled to follow the proceeds, and to that extent the cross-appeal is allowed. If the parties cannot agree as to the amount, there will be a reference to the Master, who will dispose of the costs of the reference.

No costs of the appeal or cross-appeal to either party.

CLUTE, J.:—I agree.

RIDDELL, J.:—Upon the argument of the appeal everything was abandoned by Mr. Laidlaw, for the appellant, except that lumber does not come within the words "products of the forest" in the Bank Act.

For this contention was cited *Molsons Bank v. Beaudry*, Q.R. 11 K.B. 212. I have made inquiry into the facts of that case, and have been furnished with the proceedings therein, and find that it is impossible to distinguish the present case upon the facts. Moreover, the Quebec case has not been overruled or questioned in the Quebec Courts, but is still of full authority, so far as any decision can be of authority in the jurisprudence of our sister Province.

All respect should be paid to a decision by a Court of the eminence of the Quebec Court, especially when passing upon a

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statute which is in force in both Provinces; and I have examined with great care the reasons given for the decision.

But I am not able to assent to the conclusion of Sir Alexandre Lacoste, concurred in as it is by Bossé and Blanchet, JJ.—and prefer the result arrived at by the Chief Justice of the Common Pleas and by my Lord.

I think the appeal should be dismissed with costs.

*Appeal dismissed; cross-appeal allowed in part.*

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VOLCANIC OIL AND GAS CO. v. CHAPLIN.

*Water and Watercourses—Crown Grant of Land Bounded by Highway Running near Bank of Lake—Encroachment of Water upon Highway and Land beyond—Right of Grantee to Land Covered by Water—Fixed Boundary—Lease by Crown of Land Previously Granted now Covered by Water—Trespass—Riparian Owners—Navigable Waters.*

The judgment of FALCONBRIDGE, C.J.K.B., 27 O.L.R. 34, in favour of the plaintiffs in an action of trespass, was affirmed by a Divisional Court. *Held, per CLUTE, J.*, that the real question in the action was, whether, by accretion, the Crown became entitled to what was formerly a portion of lot 178, or whether the plaintiffs were entitled to that lot, to the exclusion of the defendants, under the original grant from the Crown. The plaintiffs, claiming under a grant of the land which covered the site of the alleged trespass, continued to own that land, though covered with water, because the grantee from the Crown had no riparian rights, and the land could be well and definitely ascertained by metes and bounds.

*Per RIDDELL, J.*:—The case must be determined upon the reasons for the rules established in cases of gradual accretion. The boundary being fixed and not movable, no matter how far in the waters might come, the grantee of lot 178 did not lose his "propriety" in the land. The land in dispute, being now under part of a navigable lake, might be subject to the right of navigation; but that gave no right to the Crown to grant the soil or any interest in it; and, even if the plaintiffs were only riparian proprietors, they would be entitled to maintain this action and hold their judgment.

*Per KELLY, J.*:—The grantee could not be said to be a riparian proprietor, and his rights and liabilities differed in that respect from those of an owner of land bordering on navigable waters.

Review of the authorities.

APPEAL by the defendants from the judgment of FALCONBRIDGE, C.J.K.B., *ante* 34.

November 6. The appeal was heard by a Divisional Court composed of CLUTE, RIDDELL, and KELLY, JJ.

*O. L. Lewis*, K.C., and *W. Stanworth*, for the defendants, argued that, by the gradual wearing away by the water of the land between the old Talbot road and the lake, and afterwards the road itself and a portion of the plaintiffs' lot 178, the Crown became entitled to the land under the lake to the present water's edge. In support of this contention they cited *Foster v. Wright* (1878), 4 C.P.D. 438; *Widdecombe v. Chiles* (1903), 73 S.W. Repr. 444; *Farnham on Waters and Water Rights*, ed. of 1904, p. 332; *Hindson v. Ashby*, [1896] 1 Ch. 78, [1896] 2 Ch. 1; *Gould on Waters*, 3rd ed., pp. 156, 157, 308; *Morine on Mining Laws of Canada*, p. 75; *In re Provincial Fisheries* (1895), 26 S.C.R. 444; *Barthel v. Scotten* (1895), 24 S.C.R. 367; *In re Hull and Selby Railway* (1839), 5 M. & W. 327; *Scratton v. Brown* (1825), 4 B. & C. 485; *Rex v. Lord Yarborough* (1824), 3 B. & C. 91; *Attorney-General v. Perry* (1865), 15 C.P. 329; *Encyc. of the Laws of England*, 2nd ed., vol. 2, p. 145; vol. 6, p. 204; vol. 14, pp. 624, 625, 626; *Ruling Cases* (Eng.), vol. 17, pp. 555, 578; vol. 27, p. 50; *Standly v. Perry* (1877), 2 A.R. 195; *S.C.* (1879), 3 S.C.R. 356; *Point Abino Land Co. v. Michener* (1910), 2 O.W.N. 122.

*G. F. Shepley*, K.C., and *J. G. Kerr*, K.C., for the plaintiffs, contended that the plaintiffs were not riparian owners, and so would not have been entitled to gain additional land in case the waters had receded. Therefore, there could be no correlative right in the Crown to gain upon the plaintiffs' land by the influx of the waters of the lake, as the rights of encroachment and recession, to have such a consequence, must be mutual. The boundaries of the plaintiffs' land could now and always could have been definitely shewn by metes and bounds. The point was in a narrow compass. He referred to *Farnham on Waters and Water Rights*, p. 2499, referring to the *Widdecombe* case, cited by the other side; *Lopez v. Muddun Mohun Thakoor* (1870), 13 Moo. Ind. App. 467, especially at p. 472; *Farnham on Waters and Water Rights*, p. 1462; *Stover v. Lavoia* (1906-7), 8 O.W.R. 398, 9 O.W.R. 117; *Servos v. Stewart* (1907), 15 O.L.R. 216; *Gilbert v. Eldridge* (1891), 13 L.R.A. 411; *Marshall v. Ulleswater Steam Navigation Co.* (1871), L.R. 7 Q.B. 166; *Iler v. Nolan* (1861), 21 U.C.R. 309; *Regina v. Lord* (1864), 1 P.E.I.R. 245. The plaintiffs did not become riparian proprietors, and so entitled

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to accretion and liable for erosion; and the Missouri case of *Widdecombe v. Chiles, supra*, is contrary to the current of American authorities.

*Lewis*, in reply, submitted that the provisions of 1 Geo. V. ch. 6, sec. 2, applied here, notwithstanding the finding of the learned trial Judge.

December 24. CLUTE, J.:—In 1825, the Crown granted to the plaintiffs' predecessor in title lot 178, Talbot road survey. The original Talbot road formed the south-easterly (misquoted in the judgment below as the south-westerly) boundary of the said lot. At the time of the survey, the Talbot road ran near the bank of Lake Erie, with a strip of land between it and the lake. The bank, composed of clay, was gradually washed away by the lake until the road became dangerous; and, in 1838, it was abandoned, and a new road opened up and dedicated to public travel. This road is still travelled and known as the Talbot road. The waters of the lake not only washed away the land between the road and the lake, but also the road, and encroached a certain distance upon the plaintiffs' land. These facts are found by the learned trial Judge.

In August, 1911, the Province of Ontario demised and leased to the defendant Chaplin, with other lands, "that parcel or tract of land under the water of Lake Erie in front of lots 178 to 180 inclusive, Talbot road lots." The particular description of the portion material to the present case is as follows: "Commencing at a point on the water's edge of Lake Erie at its intersection with the south-easterly limit of lot No. 178, Talbot road lot; thence south 45° east along the production of said limit 40 chains; thence south-westerly 63 chains, more or less, to a point in the production of the south-westerly limit of lot No. 180, Talbot road, distant 40 chains from the water's edge of Lake Erie; thence north 45° west along said produced limit 40 chains to the water's edge of Lake Erie, and thence north-easterly along the water's edge of Lake Erie to the place of beginning, containing 252 acres, more or less, of land covered with water, together with a right to drill and bore for petroleum and natural gas and to remove the same, saving and excepting thereout the small dock the south-easterly corner of lot No. 178, Talbot road lot, and free access thereto for all parties using the same."



In September, 1911, the defendant Chaplin contracted with his co-defendant Curry to sink a well for the production of petroleum and natural gas upon the lands so demised by the Crown to Chaplin. Under this contract Curry entered upon what the plaintiff claims to be his land, and constructed a derrick, an engine-house, etc., and brought thereon a boiler and the usual equipment for drilling operations.

The plaintiff company is a lessee of the plaintiff Kerr, who granted him an exclusive right of boring for natural gas and petroleum on the plaintiff Kerr's lands, viz., the westerly half of lot No. 178, Talbot road survey, containing 100 acres, more or less, with all the rights and privileges necessary therefor.

The plaintiffs claim that the defendants, by the erection of their building and appliances, have trespassed upon the plaintiffs' lands. The defendants answer that the lands in question do not belong to the plaintiff Kerr, but are owned by the Crown, from whom they claim the right under their lease to do as they have done.

The real question in controversy is this: whether, by accretion, the Crown became entitled to what was formerly a portion of lot 178, or whether the plaintiffs are entitled to such lot, to the exclusion of the defendants, under the original grant from the Crown.

The defendants insist that, even admitting that, by original survey, lot 178 was wholly above high water mark and bounded on the south-east by the old Talbot road, yet, by the slow encroachment of water, the land between the road and the lake and afterwards the road and a portion of the plaintiffs' lot was gradually worn away, and the Crown thereby became entitled to the land under the lake to the present water's edge.

The plaintiffs contend that the well-known rule in such a case has no application to the facts here disclosed; that the plaintiffs were not riparian proprietors; that the rights of encroachment and recession are mutual; and that, where there is no right of encroachment in case the waters receded owing to the fact that the plaintiffs were not original riparian proprietors, so there is no correlative right to the Crown.

The cases have been very carefully reviewed by the learned Chief Justice, and it is not necessary to go over the ground covered

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by his judgment, in the conclusion of which I entirely agree. He finds as a fact that the *locus* now in controversy is part of lot 178 north of the old Talbot road.

There seems to be no English or Canadian case *exactly* covering the question here involved. The principles governing the present case are, I think, to be found in the *Lopez* case, 13 Moo. Ind. App. 467. Lord Justice James (p. 472) refers to the English rule as laid down in Hale, de Jure Maris, p. 15: "If a subject hath land adjoining the sea, and the violence of the sea swallow it up, but so that yet there be reasonable marks to continue the notice of it; or though the marks be defaced, yet if by situation and extent of quantity and bounding up on the firm land, the same can be known, or it be by art or industry regained, the subject doth not lose his property." "If the mark remain or continue, or the extent can reasonably be certain, the case is clear." "But if it be freely left again by the reflux and recess of the sea, the owner may have his land as before, if he can make out where and what it was; for he cannot lose his propriety of the soil, although it for a time becomes part of the sea, and within the Admiral's jurisdiction while it so continues." The Lord Justice points out that this principle is not peculiar to English law, but is founded in universal law and justice; "that is to say, that whoever has land, wherever it is, whatever may be the accident to which it has been exposed, whether it be a vineyard which is covered by lava or ashes from a volcano, or a field covered by the sea or by a river, the ground, the site, the property, remains in the original owner." He then refers to another principle recognised in English law, "that where there is an acquisition of land from the sea or a river by gradual, slow, and imperceptible means, there, from the supposed necessity of the case, and the difficulty of having to determine, year by year, to whom an inch, or a foot, or a yard belongs, the accretion by alluvion is held to belong to the owner of the adjoining land: *Rex v. Lord Yarborough*, 2 Bli. N.R. 147. And the converse of that rule was, in the year 1839, held by the English Courts to apply to the case of a similar wearing away of the banks of a navigable river, so that there the owner of the river gained from the land in the same way as the owner of the land had in the former case gained from the sea (*In re Hull and Selby Railway*, 5 M. & W.

327). To what extent that rule would be carried in this country, if there were existing certain means of identifying the original bounds of the property, by landmarks, by maps, or by a mine under the sea, or other means of that kind, has never been judicially determined." It may very well be said here by the plaintiffs, as was said in the *Lopez* case: "I had the property. It was my property before it was covered by the lake. It remained my property after it was covered by the lake. There was nothing in that state of things that took it from me and gave it to them." The Privy Council held that the part of the case here referred to did not fall within a local statute, but must be determined by general principles of equity. In the *Lopez* case, the facts were different from the present, for there, after the encroachment and recession and re-encroachment, the waters ultimately subsided and left the land reformed on its original site. But the principles applied in that case are equally applicable to the present. Reference is made in the judgment given in the *Lopez* case to *Mussumat Imam Bandi v. Hurgovind Ghose* (1848), 4 Moo. Ind. App. 403. In that case it was held as follows (p. 406): "The question then is, to whom did this land belong before the inundation? Whoever was the owner then remained the owner while it was covered with water, and after it became dry." The decision in that case was followed in the *Lopez* case.

In a subsequent Indian case, *Katteemohinee Dossee v. Ranee Moumohinee Dabee* (1865), referred to in the *Lopez* case, at p. 477, it was held, "that all gradual accessions from the recess of a river or the sea are an increment to the estate to which they are annexed without regard to the site of the increment, and a distinction was taken between the two cases; and it seems to have been considered that the former case did not apply to any case where the property was to be considered as wholly lost and absorbed, and no part of the surface remained capable of identification; where there was a complete diluviation of the usable land, and nothing but a useless site left at the bottom of the river."

Their Lordships, in the *Lopez* case, were unable to assent to any such distinction between surface and site, stating that "the site is the property, and the law knows no difference between a site covered by water and a site covered by crops, provided

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the ownership of the site be ascertained." They were careful, however, to observe in the judgment in that case (p. 478) that they "desire it to be understood that they do not hold that property absorbed by a sea or a river is, under all circumstances, and after any lapse of time, to be recovered by the old owner. It may well be that it may have been so completely abandoned as to merge again, like any other derelict land, into the public domain, as part of the sea or river of the State, and so liable to the written law as to accretion and annexation." It is then pointed out in the judgment that the parties themselves took the proper and prudent means to prevent the necessity of any dispute arising. The plaintiff, as between him and the State, took the most effectual means in his power, by having the description and measurement of the submerged land recorded and continuing to pay rent for it, to prevent the possibility of any question of dereliction or abandonment being raised against him. "Their Lordships are, therefore, of opinion that the property now being capable of identification . . . and having been the property of the plaintiff when it was submerged, never having been abandoned or derelict, having now emerged from the Ganges, is still his property."

In the present case the land claimed by the plaintiffs was originally laid out by metes and bounds. It was not bounded in any part of it by the lake, between which and its southern boundary lay the Talbot road and land south of the Talbot road. As it stood at the time of the grant, the owner could, by no possibility, obtain any additional land by accretion from the lake. His land was definitely ascertained by metes and bounds, as contained in the original grant from the Crown. This boundary is still easily to be ascertained, and not the less so because a certain portion of the land is now covered with water. The grantee had no riparian rights, and was not, in my opinion, subject to the law of accretion or recession applicable in such a case.

The site of the buildings erected by the defendants is on the shore, on land not covered by water at low water mark, and the plaintiffs, if they are—as the defendants allege—riparian proprietors, have right of access to the water and to every part of the approach to the water in front of their land. So that, in



my opinion, even if this land covered by water had returned to the Crown, the Crown would have no right to make a grant in derogation of the plaintiffs' rights to reach the water: *Pion v. North Shore R.W. Co.* (1887), 14 S.C.R. 677; *North Shore R.W. Co. v. Pion* (1889), 14 App. Cas. 612; *Lyon v. Fishmongers' Co.* (1876), 1 App. Cas. 662.

But I do not desire to put my opinion upon this narrow ground, but rather upon the broad ground that the plaintiffs, claiming under a grant of the land which covers the site of the alleged trespass, continue to own that land, though covered with water, because the grantee from the Crown had no riparian rights, and the same can now and always could be well and definitely ascertained by metes and bounds.

The appeal should be dismissed with costs.

RIDDELL, J.:—This is an appeal from the judgment of Sir Glenholme Falconbridge, the reasons for which are reported in 27 O.L.R. 34.

The findings of fact at the trial are wholly justified by the evidence, and are, indeed, but feebly contested on this appeal.

I am of opinion that the result is right, and the appeal must fail. Recognising the care and ability with which the learned Chief Justice has marshalled the authorities and arrived at his conclusion, I think it best to attack the problem independently and from a somewhat different point of view.

There can, I think, be no dispute about the common law principles of the ownership or "propriety" of the King in the soil under the sea, etc.

Sir Matthew Hale has written most learnedly "a work of great authority"—as the Judicial Committee calls it in 13 Moo. Ind. App. at p. 472—the well-known treatise *De Jure Maris*. It is to be found in a convenient form in Moore's *History of the Foreshore*, pp. 370-413, and I cite from that book. Hale says (p. 376): "In this sea the King of England hath a double right, viz., a right of jurisdiction, which he ordinarily exerciseth by his admiral, and a right of propriety or ownership. . . . The King's right of propriety or ownership in the sea and soil thereof is evidenced principally in these things that follow." Our Great Lakes follow in that respect the sea—the beds of all

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such belong to the King as represented by the Provincial Government: *In re Provincial Fisheries* (1896); 26 S.C.R. 444.

If a person owns land adjoining a lake, such as Lake Erie, and the lake by gradual encroachment eats into his land, he loses this land so eaten away, and the King acquires it: *In re Hull and Selby Railway*, 5 M. & W. 327; *Throop v. Cobourg and Peterborough R.W. Co.* (1856), 5 C.P. 509.

It is contended that this rule could not apply if the land encroached upon had been bounded on the side toward the water by some distinct line irrespective of the water's edge; and two Indian cases are cited.

In *Lopez v. Muddun Mohun Thakoor*, 13 Moo. Ind. App. 467, the Judicial Committee quoted part of the following extract from Hale, de Jure Maris: "If a subject hath land adjoining the sea, and the violence of the sea swallow it up, but so that yet there be reasonable marks to continue the notice of it; or though the marks be defaced; yet if by situation and extent of quantity, and bounding upon the firm land, the same can be known, though the sea leave this land again, or it be by art or industry regained, the subject doth not lose his property; and accordingly it was held by Cooke and Foster, M. 7 Jac. C.B. though the inundation continue forty years. If the marks remain or continue, or extent can reasonably be certain, the case is clear.—Vide Dy. 326.—22 Ass. 93." I quote from Moore's History of the Fore-shore, p. 381. The Judicial Committee, however, did not apply that statement of the law to the case in hand, which was that of a gradual encroachment by the River Ganges and a recession by that river. But they went on to say: "There is, however, another principle recognised in the English law, derived from the civil law, which is this,—that where there is an acquisition of land from the sea or a river by gradual, slow and imperceptible means, there, from the supposed necessity of the case, and the difficulty of having to determine, year by year, to whom an inch, or a foot, or a yard belongs, the accretion by alluvion is held to belong to the owner of the adjoining land: *Rex v. Lord Yarborough*, 2 Bli. N.R. 147. And the converse of that rule was, in the year 1839, held by the English Courts to apply to the case of a similar wearing away of the banks of a navigable river, so that there the owner of the river gained from the land in the same way

as the owner of the land had in the former case gained from the sea (*In re Hull and Selby Railway*, 5 M. & W. 327). To what extent that rule would be carried in this country, if there were existing certain means of identifying the original bounds of the property, by landmarks, by maps, or by a mine under the sea, or other means of that kind, has never been judicially determined." And the Committee, pointing out that the matter had been provided for by statute, determined the case on the "positive written law," and not the English law at all.

That the Committee is contrasting a gradual swallowing up and one produced by "the violence of the sea" is clear enough, but is made even more clear, if possible, by the examples on p. 473 of the report, "covered by lava or ashes from a volcano"—lava and ashes from a volcano do not cover land by slow and imperceptible degrees.

The same difference is to be seen in the argument of the Solicitor-General in 5 M. & W. at p. 329, and also that of Sir Frederick Pollock, at p. 330. Sir Frederick endeavoured to have the Court follow Hale's rule for "sudden . . . overflowing of the land," in the case then under consideration of "an imperceptible overflowing"—but failed.

The case of *Hursuhai Singh v. Synd Lootf Ali Khan* (1874), L.R. 2 Ind. App. 28, simply follows the case in 13 Moo. Ind. App. All the cases referred to in the Judicial Committee as "others which have followed it before this Committee" (p. 32), are Indian cases (p. 30).

These cases, being decided upon positive written law, are no authority for the proposition in Theobald's Law of Land, p. 37: "If land is submerged by a river or the sea, and the river or sea retires and leaves the land free from water, the owner is entitled to the land if he can identify the site of it."

Nor am I able to derive assistance from the maxim *Qui sentit onus debet sentire commodum*. The sages of the law were liable at any time to drop into Latin or Law French or a mixture of the two—generally a barbarous mixture—and give utterance to a "maxim." While, to borrow the terminology of formal logic, the maxim was not infrequently made a major premiss of a syllogism, still almost invariably it is apparent that the maxim is really a sententious statement of a conclusion arrived at by

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the inductive method—a generalisation more or less accurate from a number of decisions or considerations. Not unlike the proverb, which has been defined as being “the wisdom of many and the wit of one,” the maxim in most instances requires the modifier “sometimes” expressed or understood. A maxim is a convenient method of summing up conclusions, but is dangerous as a premiss upon which to base an argument.

Taking the maxim in question, I can find no possible reason why the two accusatives should not interchange, and the maxim, with equal accuracy and value, read, “*Qui sentit commodum debet sentire onus.*”

But, in any case, I cannot see its application as an argument in favour of the respondents—there is no pretence that the rule as to gradual accretion, etc., would apply to lot 178 until it became in fact riparian—becoming so, it is argued that *sentit commodum*, and, consequently, *debet onus sentire*.

The present case must, as it seems to me, be determined upon the principles laid down in cases of gradual accretion—or rather the reasons for these rules.

In *In re Hull and Selby Railway*, 5 M. & W. 327, at p. 333, Alderson, B., gives this as the reason for the rule, that “if the sea gradually covered the land . . . the Crown would be the gainer of the land. . . . That which cannot be perceived in its progress is taken to be as if it never had existed at all.”

Lord Justice James, in the *Lopez* case, 13 Moo. Ind. App. 467, at p. 473, bases the rule upon the same principle, expressed in different language, and rather implicitly than explicitly—“from the supposed necessity of the case, and the difficulty of having to determine, year by year, to whom an inch, or a foot, or a yard belongs.”

What this means is something like the following: “Where, to determine whether a piece of land belongs to a person on one side or another of some boundary, it is necessary to find that boundary—then, if the boundary moves one way or the other by insensible and gradual accretion or the like, the position of that boundary at any particular time is the boundary for the owner at that particular time, irrespective of its position either at the time of the deed or any time before or after.” A man



has a grant of land "to the water's edge," "to the bank of the lake," etc., etc.—to determine his boundary at any particular time, find the position of "the water's edge," "the bank of the lake," etc., at that particular time. The change, being imperceptible, is considered as not having happened at all.

But, if the boundary is fixed and not movable—that is, the words fixing the boundary do not connote a shifting or moving line—the reasons do not apply; and *cessante ratione cessat ipsa lex*.

In my view, no matter how far in the waters of the lake may come, the grantee of the lot 178 does not lose his "propriety" in the land; and, no matter how far out the lake may recede, he cannot get an inch beyond his line as first fixed.

The single case of *Widdecombe v. Chiles*, 73 S.W. Repr. 444, 173 Mo. 195, is opposed apparently to that view. This seems to be law still in Missouri—I do not find that it has been overruled, and it is cited without disapproval in *Frank v. Goddin* (1905), 193 Mo. 390, at p. 395. But it is not binding on us, and, as has been pointed out in the judgment appealed from, it is opposed to the mass of authority in the United States. It cannot, I think, be supported on principle, and I decline to follow it.

The case of *Foster v. Wright*, 4 C.P.D. 438, cited in support of the appeal, does not assist the appellant when the facts of the case are examined. The owner of the manor of H. "also held the fishery of all the waters of H." He enfranchised a portion of land "A," but in the deed expressly "excepted and reserved from the grant . . . his seignorial rights . . . together also with free liberty of . . . fishing . . . upon the premises or any part thereof. . . ." The manor, being forfeited on attainder, was regranted to the predecessor in title of the plaintiff. The enfranchised land "A" did not at the time of the enfranchisement abut on the river L.; but, in course of time, by imperceptible degrees, the river ate into the land and ultimately encroached to some extent upon the land "A," now the property of the defendant. As a strip of his land now formed part of the bed of the river L., the defendant claimed the right to go upon that part of it and fish for salmon which

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came there. It is quite true that one of the Judges, Lindley, J., thought that the bed of the river, shifting insensibly as it did, remained, with all its changes, the property of the owner of the manor through and over which it had originally flowed, that is, for all the purposes of the case. "I am of opinion that, for all purposes material to the present case, the river has never lost its identity, nor its bed its legal owner:" p. 446. No quarrel can be raised with this decision so guarded; the question was solely as to the right to fish—and all the learned Judge actually decided was, that, where the owner of a manor reserves the right to fish when enfranchising part of his manor, he has that right over the part so enfranchised *in æternum*, and over any river that may be there at any time. This is the ground taken by the Chief Justice, Lord Coleridge, p. 449. It is quite true that Lindley, J., says (p. 448): "Supposing, therefore, that the plaintiff's right to fish in the Lune depends on his ownership of the soil of the river bed, I am of opinion that the plaintiff has that right; for, if he was the owner of the old bed of the river, he has day by day and week by week become the owner of that which has gradually and imperceptibly become its present bed; and the title so gradually and imperceptibly acquired cannot be defeated by proof that a portion of the bed now capable of identification was formerly land belonging to the defendant or his predecessors in title." It is to be noted that this conclusion is based upon cases such as *In re Hull and Selby Railway*—Lindley, J., saying (p. 447) that the Court in that case declined to recognise the proposed qualification to the general rule "if certain boundaries are not found." But in that case the only "certain boundary" was the bank of the river; and, while the original boundary could be made out by metes and bounds, it could be done only by determining where the bank was at the time of the grant.

In *Rex v. Lord Yarborough*, 3 B. & C. 91, the boundaries were a sea-wall or sea-bank and the sea; in *Attorney-General v. Chambers* (1859), 4 DeG. & J. 55, it was the sea-shore or one or other side of it. I do not find any case in which a boundary, a fixed, immovable line, has ever been crossed over on this principle.

It is to be observed that Lindley, J., bases his judgment also

on the ground taken by the Chief Justice—and, further, that in none of the cases in which *Foster v. Wright* is cited, is the point now under discussion referred to: *Hindson v. Ashby*, [1896] 1 Ch. 78, [1896] 2 Ch. 1; *Ecroyd v. Coulthard*, [1897] 2 Ch. 554; *Hanbury v. Jenkins*, [1901] 2 Ch. 401; *Mercer v. Denne*, [1904] 2 Ch. 534.

It may turn-out that the land of the plaintiffs, being now under part of a navigable lake, is subject to the right of navigation, etc. That, however, is the right of the public, and gives no right to the Crown to grant away the soil or any interest in the soil.

I am further of opinion that, even if the plaintiffs were only riparian proprietors, they would be entitled to maintain this action and hold the judgment they have obtained; but I do not pursue this inquiry.

I am of opinion that the appeal must be dismissed with costs.

KELLY, J.:—There is, to my mind, a distinction to be drawn between those cases where lands border upon navigable waters, the boundary not being otherwise defined, and the present case, where the boundary nearest to the water is “clearly and rigidly fixed” by the Crown grant, the description in which is by metes and bounds.

In the present case, too, there is the further fact that the land so patented was separated from the water, not only by the Talbot road, but also by other lands between that road and the water’s edge.

The grantee could not have been said to be a riparian proprietor, and his rights and liabilities differed in that respect from those of an owner whose lands border on navigable waters.

After a careful perusal of the evidence and numerous authorities, I am of opinion that the judgment of the learned Chief Justice of the King’s Bench is correct, and it should not be disturbed.

*Appeal dismissed with costs.*

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## [DIVISIONAL COURT.]

## ERIKKILA v. MCGOVERN.

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*Assessment and Taxes—Tax Sale—Action to Set aside—Time-limit—Assessment Act, 1904, sec. 173—Commencement of Statutory Period—Date of Tax Sale or Tax Deed—Irregularities in Sale—Non-compliance with Statute—Validating Act, 10 Edw. VII. ch. 124, sec. 4—Construction.*

In an action to set aside a sale of land in the City of Port Arthur for taxes in arrear for 1905, 1906, and 1907, made on the 16th November, 1908, and a deed executed by the Mayor and Treasurer of Port Arthur, on the 19th January, 1910, conveying the land to the defendant:—

*Held*, in this agreeing with the judgment of LENNOX, J., that the sale was irregular by reason of non-compliance with the provisions of the Assessment Act, 4 Edw. VII. ch. 23, and could not stand unless saved by legislation.

But *held*, reversing the judgment of LENNOX, J., that the sale was validated and confirmed by sec. 4 of an Act respecting the City of Port Arthur, 10 Edw. VII. ch. 124.

*Held*, per LENNOX, J., following *Donovan v. Hogan* (1888), 15 A.R. 432, that the plaintiff was not barred by sec. 173 of the Assessment Act; for "the time of sale," mentioned in that section, means the time of the delivery of the tax deed, which was less than a year before action.

*Per* RIDDELL, J., that it was not necessary, in view of the validating enactment, to consider whether a change in the wording of the section (now sec. 173 of the Assessment Act) which was interpreted by the Court of Appeal in *Donovan v. Hogan*, had rendered the decision in that case inapplicable. In sec. 4 of 10 Edw. VII. ch. 124, a distinction is made between "sales" and "deeds;" "sales" before the 31st December, 1908, were validated in the first clause; "deeds" to convey the lands sold were validated in the second.

At a tax sale holden on the 16th November, 1908, for taxes alleged to be in arrear for the years 1905, 1906, and 1907, amounting with expenses to \$15.05, the Treasurer of the City of Port Arthur purported to sell to the defendant lot 35 as laid out on park lot 3 on the north side of John street in that city; and on the 19th January, 1910, the Mayor and Treasurer of Port Arthur executed a deed thereof to the defendant.

On the 5th March, 1910, the plaintiff, after examining the registered title, but without searching for taxes or sales, purchased this lot and the adjoining lot 34, from the registered owners, Erik and Anna Wiita, for \$900 (then paid), obtained the deed thereof in fee simple, and registered this deed on the 7th March, 1910, without actual notice or knowledge of the tax sale or conveyance.

On the 30th March, 1910, the defendant's solicitor made a search and found that a deed had been made to the plaintiff;



and thereupon, on the following day, registered the defendant's tax deed.

Afterwards, on the 21st November, 1910, the defendant paid the taxes for that year. Three days later, on the 24th November, the plaintiff, in response to the collector's demand, paid the taxes on lots 34 and 35.

On the 21st December, the collector notified the plaintiff that the defendant has also paid taxes on lot 35. This was the first intimation the plaintiff had that his title was questioned or defective. Thereupon the plaintiff, on the 29th December, 1910, tendered to the defendant the sum of \$40.32; this being, so far as appeared at the trial, the total amount paid out by the defendant, with interest added at ten per cent. The plaintiff also, at the same time, tendered a conveyance for execution. The defendant refused to accept the money or convey the land to the plaintiff.

This action was brought to have it declared that the sale and tax deed of lot 35 was null and void, and for an injunction restraining the defendant from alienating this land, and for an order for delivery up and cancellation of the tax deed.

The action was tried before LENNOX, J., without a jury, at Port Arthur.

*H. S. Osler*, K.C., and *W. McBrady*, for the plaintiff.

*F. H. Keefer*, K.C., and *A. J. McComber*, for the defendant.

October 31. LENNOX, J. (after stating the facts as above):—The plaintiff is in possession. Subject to the question of whether the defendant has acquired a tax title, the plaintiff's title was not questioned. He put in his deed and a registrar's abstract of title; he proved the facts hereinbefore set out, and other facts to be referred to later.

The defendant has never been in possession. He furnished no evidence as to the imposition of the tax or other statutory conditions justifying the sale. True, the tax deed was put in by the plaintiff, and the defendant relied upon the recitals it contains. But, of a tax deed, *Boyd, C.*, says in *Essery v. Bell* (1909), 18 O.L.R. 76, at p. 79: "The production of the tax deed is not enough—it is a mere starting-point; further evidence must be

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given going to the foundation on which the deed rests, in order that the validity of the assessment and all subsequent proceedings may be exhibited." See also *Stevenson v. Traynor* (1886), 12 O.R. 804, and *Jones v. Bank of Upper Canada* (1867), 13 Gr. 74.

On the contrary, in *Kennan v. Turner* (1903), 5 O.L.R. 560, the onus was said to be upon the plaintiff. There the grantee under the tax title was in possession, and had made valuable improvements. But that hardly marks a distinction, as in the *Essery* case the plaintiff was out of possession and brought her action fifteen years after the tax sale.

The weight of authority, then, seems to be that the defendant must do more than shew that he is the grantee in a tax deed; and, if it were necessary to a decision in this case, I would certainly hold that he was at least bound to shew that the "essential requirements" of the statute had been complied with. However, I propose to decide this case without balancing as to the person on whom rests the onus of proof. There is some important evidence in this case outside of that furnished by the deed; although, take it all in all, the evidence is singularly disconnected and unsatisfactory.

The conditions which will validate or invalidate the deed in question begin with the year 1905. All taxes down to the end of 1904 appear to have been paid. The statute governing this case is, therefore, the Act of 1904, 4 Edw. VII. ch. 23, which came into force on the 1st January, 1905.

At the threshold, then, and going to the root of the whole matter, is the defendant's objection that, the deed not having been "questioned before some Court of competent jurisdiction within two years from the time of sale," the plaintiff is barred by sec. 173. This section is the equivalent of sec. 156 of R.S.O. 1877, ch. 180; and, following the unanimous judgment of the Court of Appeal in *Donovan v. Hogan* (1888), 15 A.R. 432, I hold that "the time of sale," mentioned in sec. 173, means, not the time of the conditional acceptance of the defendant's offer, but the time when the sale became effective and complete by the execution and delivery of the tax deed; and this was within less than a year before action.

Many objections to the defendant's title are set out in the statement of claim; but the grounds upon which, at the trial, I was asked to declare the tax deed invalid were: (1) that the sale was not properly conducted; (2) that in the year 1907 the provisions of sec. 110 were not complied with—the affidavit made by the collector on the return of his roll not being sworn before any of the persons authorised by the Act (see sub-sec. 3, and sec. 222), and being insufficient in substance and in form; and (3) that no part of the taxes for which the land was sold was in arrear for three years.

As to the manner of conducting the sale, it was shewn that 103 parcels were sold; that only about thirty persons were present, and many of these were not bidders; that, as compared with actual values, the properties—including lot 35—were sold for a trifling sum; that the Treasurer paid no attention whatever to the value of the properties; and that the whole time occupied in selling was less than two hours.

Whatever weight it may have in connection with other matters, I cannot give effect to this objection as a substantive ground for setting aside the tax deed. Even apart from the curative effect of sec. 172—which, however, is conditioned upon the sale being “openly and fairly conducted”—the failure of the Treasurer to look after the owners' interests is not enough. If the sale was properly advertised, and the conduct of the Treasurer honest, the scarcity of bidders is not good ground for complaint. It is true that in *Black v. Harrington* (1865), 12 Gr. 175, Spragge, V.-C., said (p. 178): “As I have said in other cases, it is the duty of the Sheriff to make himself acquainted with the particulars of the land he is selling,” etc.; and, of course, the Treasurer is in a similar position. But this, I understand, is merely what the learned Judge considered the Sheriff ought to do: not that the Sheriff was legally or officially bound to inform himself. At all events, sec. 142 is framed to prevent any implication of this kind, and, amongst other things, enacts that “a Treasurer shall not be bound to . . . inquire into or form any opinion of the value of the land;” and as far back as *Cotter v. Sutherland* (1868), 18 C.P. 357—when there was no such statutory provision—the Court refused to presume against

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the validity of a sale upon the supposition that too much land was sold for a small sum of money. The plaintiff has no legal ground for complaint as to this.

The second ground taken by the plaintiff touches a prominent feature of the Assessment Act—the determination of the Legislature that no man shall be put to cost and no man's land shall be sacrificed without a specific demand for payment and clear evidence of such demand.

Sections 99, 100, 101, and 102 of the Act distinctly require the collector to: (a) personally demand payment of the taxes; or (b) deliver a written or printed notice and demand; or (c), in the case of non-residents, transmit a notice and demand by mail; and, as a record of this, immediately to enter the date of such personal demand, delivery, or transmission opposite the name of the person taxed. Then in proof of this—as a guarantee that there shall not be a false return—sec. 110 requires that the collector shall, at or before the return of his roll, make oath that these dates appearing on the roll are correct and true.

Looking at the clear and positive provisions of these sections and scheduled form “H” at the end of the statute, it is simply farcical to talk of exhibit 1 as a substantial compliance with sec. 110. And this is not all. There is no affidavit whatever with the roll of 1906; there is none in connection with the roll of 1905; and without arrears in 1905—I do not say without an affidavit—there could be no valid sale in 1908. Yet, regrettable as I think it is, I feel compelled to hold that this is one of the many “neglects, omissions, or errors,” which sec. 172 is probably designed to cure. Where it will lead, in the end, is another matter.

I was very much impressed by Mr. Osler's argument on the third point taken, namely, that taxes imposed upon lot 35 in and for the year 1905, though remaining unpaid, could not be “in arrear for three years” on the 1st January, 1908, within the meaning of secs. 121, 135, and 136, and that the land could not, therefore, be legally sold in 1908. This argument was not based upon the authority of any decided case, but upon the proper construction of the concluding words of sec. 121, namely: “and, for the purpose of the computation of such three years, the taxes for each year shall be deemed to have been due and



payable on and from the first day of January in each year." Upon this it was contended, if I understood the argument aright, that the taxes for the year, being payable "on and from" the 1st January, 1905, could not be in arrear until the 2nd January; and so there could not be taxes three years in arrear on the 1st January, 1908.

In support of this view I was referred to the change effected by sec. 21 of 10 Edw. VII. ch. 88; which says that sec. 121 is amended by striking out the words "to have been due and payable on and from the 1st day of January in such year," and substituting the words "to have been in arrear on and from the 1st day of January in such year," with the manifest inference, as it is claimed, that but for the words "in arrear" the taxes for the year of assessment could not be taken to be overdue on the first day of that year.

I confess that, if this were a matter of construction arising for the first time, I would be disposed to accede to it. But this is not a new question, in this sense, that, although it may not have been directly raised in any of the cases, it was involved in the decision of a long line of cases conducted by distinguished counsel and decided by eminent Judges.

The language of sec. 409 of the Consolidated Municipal Act, 1903, upon this point, is so nearly identical with sec. 121 that it need not be quoted.

Referring to sec. 409, in his work on Titles, Mr. Armour says: "Taxes for the current year, though due by statute on the first day of January, and before they are actually imposed, are not in arrear during the year;" and, therefore, a covenant against arrears of taxes contained in a deed is not broken by non-payment of taxes for the current year (p. 165).

In support of this reference is made to *Corbett v. Taylor* (1864), 23 U.C.R. 454. But the case does not fully bear out the language of the text, not only because it was merely the determination of what the parties must have meant by the language of a private contract, but furthermore that the statute then in force, and referred to—C.S.U.C. ch. 55—says nothing whatever about the taxes being due at the beginning of the year,

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but only that they are to be considered as imposed for the whole year, from the 1st January to the 31st December.

I am, therefore, clearly of opinion that, whatever I might have done if this were a case of first instance, I should not now attempt to put a construction upon sec. 121 so completely out of harmony with the construction impliedly adopted in a long, and I think unbroken, line of cases.

As I have already said, the evidence is disconnected and unsatisfactory. Many important questions which should have been cleared up *by somebody*, have not been cleared up; but there are others, not referred to on the argument, upon which I am able to find, and with which I propose to deal.

For instance, so far as appeared at the trial, it was assumed that, because the owner had failed to redeem within a year, the right to redeem was gone, and the defendant *ipso facto* became entitled to a deed. This is not the law under the statute of 1904. The owner has at least thirteen months within which to redeem. The plaintiff may be, and I think is, still entitled to redeem, by reason of the entirely new protection afforded him by sec. 165. Until the Treasurer has searched the registry office and the Sheriff's office, mailed a notice to the owner, and pointed out to him the right to redeem, with the amount required for redemption, and until the owner has again defaulted for thirty days, the Mayor and Treasurer have no right or authority to execute, and the defendant has no right to obtain, a deed of the plaintiff's land. I am not distinguishing between the former owner and the present plaintiff.

Is the onus upon the plaintiff, then, to prove that this was not done? I do not think it is. The defendant, if he had a score of tax deeds, would still have no legal status without a tax sale as the basis; and this search, notice, and warning is as much a basic condition of the authority to convey and the right to obtain a conveyance, as the tax sale itself or the existence of taxes in arrear. As a matter of fact, and indeed as a matter of law, this is, by sec. 165, specifically made a condition precedent; the wording being, "Then" (referring to the expiration of the year) "the Treasurer, before the execution of the tax deed, shall," etc.

But, in any case, the evidence satisfies me that sec. 165 was not complied with. There was specific evidence of the charges against the land, in detail and in bulk. The total was \$15.05. This amount was paid by the defendant at the time of sale; and the statute requires him to pay one dollar for the deed. If this search is made, he has to pay the expense of it and of the notice, etc., in addition. I am satisfied that this expense was not paid or incurred. In confirmation of this, a witness for the defence proved that the defendant furnished particulars of his whole outlay in connection with this lot to the Wiitas. From this source, no doubt, the particulars contained in Mr. Brady's letter (exhibit 11), tendering \$40.32, were obtained; and in this letter the solicitor says: "Mr. Errikkila is not aware of any other amount having been paid by you in connection with this land; but, if there is any other sum that you have paid, Mr. Errikkila will be pleased to refund it to you, with interest at ten per cent. per annum."

The correctness of this statement has never been disputed; and in it there is no item for expenditure under sec. 165. The defendant was a member of the city council when the time arrived for notifying and warning the owners, and it might be said that he owed some duty to the owners, if his officer, the Treasurer, failed in his duty—owed the duty of full disclosure, at least.

Counsel for the defendant formally admitted the tender, in Court. The admission being without qualification, it was an implied admission that the tender was sufficient in amount, when the terms of the letter are taken into account.

How, then, are these sections, 165 and 172, to be dealt with? One must not be taken as a repeal of the other if any other construction is possible: *Kutner v. Phillips*, [1891] 2 Q.B. 267. If possible, they must be read so as to make a consistent enactment of the whole statute: *Canada Sugar Refining Co. v. The Queen*, [1898] A.C. 735, 741.

The history of the legislation must be taken into account; and, therefore, I am bound judicially to notice that, so far as is material here—so far as there is any apparent or actual conflict—sec. 172 is an old section, and sec. 165 appeared for the first

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time in 1904. Hardcastle, 4th ed., p. 216, cites James, L.J., as saying, in *Ebbs v. Boulnois* (1875), L.R. 10 Ch. 479, 484, that, "if there are two inconsistent enactments, it must be seen if one cannot be read as a qualification of the other."

This can, and I think should, be done in this case; and, without usurping legislative powers, I think I have a right to read sec. 172 as if it began with the words, "Subject to the provisions of section 165;" and I read it in that way.

The alternative would be to treat the earlier enactment, sec. 172, as repealed: Maxwell, 4th ed., p. 235, referring to a number of authorities.

It has sometimes been argued that the latter clause is to be taken as the will of the Legislature. This construction was rejected by our Supreme Court in *City of Ottawa v. Hunter* (1900), 31 S.C.R. 7; and it would manifestly be absurd to hold that the Legislature, when it introduced this elaborate and carefully worded section, intended to strangle it in its birth.

I am, therefore, of opinion that the section has effect according to the ordinary meaning of its language; that it is imperative; and that, in the absence of compliance with its provisions, the tax deed conferred no title upon the defendant.

The evidence shews that sec. 143 was not complied with. I, of course, read "city" for "county." The sale was properly published in *The Gazette*, but was only published for a period of four weeks in Port Arthur.

Again, in lieu of the defaulters' list required to be furnished by the Treasurer to the Assessment Commissioner, and to be kept on file in his office, under sec. 121, and of the list to be prepared by the Commissioner under sec. 122, and verified and returned by him to the Clerk, and of the list to be furnished by the Clerk to the Treasurer—which, by sec. 126, these officers are bound under a penalty to preserve—all that could be produced at the trial was what purported to be a copy of the Assessor's return of lands liable to be sold in 1908. In this it was stated that the Wiitas had been notified; but no witness was called to verify this copy of the entries it contained, or to state where it came from or how it came to be made. The copy, of course, is not evidence. The original is evidence under the statute.



Under these circumstances, and finding that within a month or two following this return the collector served his notice and demand for taxes (exhibit 5), containing a host of particulars and several references to arrears, but with the column for "arrears" *a blank*, and finding too that the taxes for 1908 were paid on the 8th October, 1908, and before the sale, I am not convinced that the statements appearing in this alleged copy are reliable.

On the contrary, to me it is inconceivable that the Wiitas received a notice that there were arrears of taxes against their lands, and that the lands would be sold and lost to them, and ignored all this, and yet, almost immediately afterwards, paid the taxes for 1908 on these, practically forfeited, lands. The argument pointed by these circumstances is not unanswerable, but it is full of cogent suggestions. In this connection there is this significant fact, too, that whenever an original is produced it proves upon the face of it that important statutory provisions have been flagrantly disregarded, if not completely ignored. For instance, the list of lands liable to be sold, sent by the Mayor to the Treasurer, and the Mayor's warrant attached—both originals—are produced; and this list shews upon the face of it that every requirement of sec. 139—and none of them are unimportant—has been ignored.

Under such circumstances, I am not at all convinced that the provisions of secs. 121 and 122 were observed. These are imperative provisions, and were not cured by sec. 208 and sec. 209 of R.S.O. 1897, ch. 224: *Wildman v. Tait* (1900), 32 O.R. 274, and cases there collected.

The evidence, scanty as it is, affords many other instances of setting at naught the provisions of the Assessment Act; but I shall refer to only one of them. There were three years' taxes said to be in arrear on the 1st January, 1908; namely, for 1905, 1906, and 1907. Whether there were taxes in arrear in respect of the second and third of these years is immaterial as regards the questions of validity or invalidity. What the statute requires is not three years of arrears of taxes, but some taxes in arrear for as much as three years. The crucial point, then, is: were these taxes in arrear on lot 35 for the year 1905? I find

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that there were no taxes legally owing or imposed upon lot 35 in the year 1905.

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In 1905, lot 35 and five other lots were assessed together at a total sum of \$750. So far as I have a note of the evidence, it was not stated whether the other five lots or any of them were under the same ownership as lot 35, nor does it affect the issues in this case. The statute and the decisions are clear that there can be no valid imposition of taxes, that no arrears can arise or accrue, under an attempted assessment of this kind. Lot 35 and other lots were laid out upon a subdivision of park lot 3 north of John street; and the plan, No. 112, was registered on the 4th December, 1901.

The Act of 1904 does not, I think, differ in this respect materially from earlier Acts, except in affording additional means for obtaining information and verifying it. Section 22 specifically requires that every lot shall be assessed separately, and the manner in which the whole assessment is to be made is stated with great particularity. A joint assessment is absolutely illegal. The levy founded upon it is also illegal, fails to become a charge upon the land, and, of course, creates no arrears. Therefore, there could be no legal sale or conveyance.

Even sec. 172 cannot vivify a transaction of this kind; for whatever multitude of "neglects, omissions, or errors" may thereby be condoned, yet to give effect to the section there must have been some taxes in arrear for three years, within the meaning of sec. 121.

Many cases might be referred to. The latest I have come upon is *Blakey v. Smith* (1910), 20 O.L.R. 279. The judgment of the Court was delivered by the Chief Justice of the Common Pleas. At p. 283 the learned Judge said: "In our opinion, the sale was invalid because there was no valid assessment in the years 1901 and 1902, and therefore there were no taxes legally imposed for which it could be sold for taxes for those years. . . . If the assessment could be treated as an assessment of lots 18 and 19, these being separate and distinct parcels of a subdivision, a plan of which was registered, should have been assessed separately, and the joining of them in one assessment was improper, and the assessment was therefore invalid: *Christie v.*

*Johnston* (1866), 12 Gr. 534." And the learned Judge points out that an illegal assessment of this kind is not cured by sec. 172, for reasons, in effect, that I have already stated. In that case, lots 18 and 19 were the property of the same owner.

In *Christie v. Johnston*, the Treasurer had attempted a division, as he did here, and it, too, was held to be illegal.

In this case there is no explanation of why or how the apportionment was made or what was the total; but, when steps for sale are taken, lot 35 stands alone. The special provisions of sec. 40 have no application here.

*Black v. Harrington*, 12 Gr. 175, where three lots were included in one assessment, may also be looked at; also *McKay v. Cryslar* (1879), 3 S.C.R. 436.

But the defendant's counsel says that it matters not about any of these cases, or what the policy or underlying principle of the Assessment Act may be, or whether there were taxes in arrear or not. He says: "We have a parliamentary conveyance of the plaintiff's land:" in other words, a validating Act, "An Act respecting the City of Port Arthur," 10 Edw. VII. ch. 124 (1910). The relevant parts of this statute are the preamble and sec. 4.

An interpretation of this section is not easy; but, after a great deal of consideration, I have come to the conclusion that it has not the effect contended for.

First, I think the construction placed upon the meaning of a sale in *Donovan v. Hogan*, *supra*, should be followed here; and, if followed, the section does not apply; because there was no deed, and consequently no sale, until the 19th January, 1910. The Legislature must be taken to adopt the interpretation of the Courts when in subsequent enactments, *in pari materiâ*, it uses the same or similar words or phrases. If the Legislature desires to be understood as using the words in another sense, it secures this end by specified interpretation clauses.

I am aided, too, in this construction, by reference to another private Act obtained by Port Arthur in the following year—not referred to, I think, by counsel for the defence at the trial—also by reference to the preamble of both these Acts, and by a comparison of what was granted in each case with what was asked.

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Again, while it is clear that the Legislature intended to do away with the effect of many irregularities, errors, and omissions of the municipality and its officials, the Legislature did not intend in this case, any more than in the case of sec. 172 of the general Act, to interfere in the slightest degree with the fundamental requirements of every valid tax sale, namely, the existence of legally imposed taxes three years in arrear.

I know that the section is awkwardly worded; but it is the language of the petitioners, to be construed most strongly against them; and to take away the property of another it must be specific and clear, to all intents and purposes. It is not to be presumed that the Legislature intended confiscation, which this would be if taxes were not in arrear, or to encroach upon the rights of others, unless the intention were expressed in terms free from doubt: *Western Counties R.W. Co. v. Windsor and Annapolis R.W. Co.* (1882), 7 App. Cas. 178, at p. 188; *Commissioner of Public Works (Cape Colony) v. Logan*, [1903] A.C. 355. And it is to be presumed that the Legislature does not intend to make alterations in the law beyond what it explicitly declares—*Arthur v. Bokenham* (1708), 11 Mod. 150—or to overthrow fundamental principles or depart from a general system of law without expressing its intention with irresistible clearness, and such effect cannot be given to general words, however broad: cases cited in Maxwell, p. 122 *et seq.*

Indeed, there could be no better illustration of these rules of construction than the section itself. In the face of the provisions of sec. 139 and other sections providing for the sale of limited estates in the land, and for the reservation of the rights of the Crown, if general terms are to be taken literally—as the defendant contends—then even the rights of the Crown are set aside; because the section declares that the lands are vested in the purchaser in fee simple.

But it is idle to multiply reasons. It is enough to say that the language does not compel me to conclude—and I am not going to assume—that what the Legislature has done is to say: “No matter whether there were taxes imposed or not, no matter whether any statutory requirements were observed or not, no matter what was done or was not done, yet, if the Treasurer pur-



ported to sell, and if he and the Mayor *at any time* purported to convey, the title is vested in the purchaser in fee simple."

In *Webb v. Manchester and Leeds R.W. Co.* (1839), 4 My. & Cr. 116, Lord Cottenham said: "If there be any reasonable doubt as to the extent of their powers" (given to the railway company in their private Act), "they must go elsewhere and get enlarged powers; but they will get none from me, by way of construction of their Act of Parliament."

The Legislature has the power to do what it will in this case. It is a question here only of what it has done; and, without language more explicit and clear, it cannot be assumed that it intended to confiscate the property of any one: *London and North Western R.W. Co. v. Evans*, [1893] 1 Ch. 16; *Davis & Sons v. Taff Vale R.W. Co.*, [1895] A.C. 542.

There will be judgment for the plaintiff declaring that the deed in question is null and void, and for its delivery up and cancellation, and restraining the defendant from interfering with or alienating the lands in question, and vacating the registration of this deed.

There are tax sale cases, of which *Black v. Harrington*, 12 Gr. 175, is an instance, in which costs have been refused to the successful party, upon the ground that the other party to the action was unconnected with the transactions which vitiated the sale. In *Irwin v. Harrington* (1865), 12 Gr. 179, the plaintiff, as here, had offered to recoup the defendant, and was allowed costs. The general rule, of course, is, costs to the party vindicated.

The municipality will, of course, repay the taxes of 1910 paid by the defendant. I will not stop to consider whether this can be recovered by the defendant as paid under a mistake of fact. It is a small sum; and, as between the plaintiff and defendant, I do not think it is unfair that the plaintiff should pay this sum which he has already offered to pay; but I do not put it upon the ground that the plaintiff has been relieved from payment, as I have already decided that this was not a charge upon his land.

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The plaintiff will have judgment for full costs of the action, less \$15.05 paid by the defendant, with interest at ten per cent. from the date of the auction sale.

The defendant appealed from the judgment of LENNÓX, J.

December 12. The appeal was heard by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.

*J. Bicknell*, K.C., for the defendant, relied upon the Assessment Act, 1904, 4 Edw. VII. ch. 23, secs. 172 and 173, and particularly upon the Act respecting the City of Port Arthur, 1910, 10 Edw. VII. ch. 124, sec. 4. Under the first-named statute, the plaintiff was barred, because no action had been brought within two years from the time of sale. Even if the sale was irregular, it was validated and confirmed by the special Act of 1910. He referred to *Burrows v. Campbell* (1912), 4 O.W.N. 249, 23 O.W.R. 271; *Town of Sturgeon Falls v. Imperial Land Co.* (1912), 4 O.W.N. 178. There was no necessity for dividing the lots for the purpose of assessing.

*Glyn Osler*, for the plaintiff, contended that the onus was upon the defendant to establish a valid sale, and this he had failed to do, as there could be no doubt about its irregularity: *Essery v. Bell*, 18 O.L.R. 76. The sale was conducted in the teeth of sec. 22 (c) and (d) of the Act of 1904: *Blakey v. Smith*, 20 O.L.R. 279. In the year 1907, the provisions of sec. 110 of the Act of 1904 were not complied with. No part of the taxes for which the land was sold was in arrear for three years. As to the validating Act of 1910, the construction placed upon the words "a sale" in *Donovan v. Hogan*, 15 A.R. 432, should be followed; and, if so, sec. 4 of that Act did not apply, because there was no deed until the 19th January, 1910.

*Bicknell*, in reply.

December 24. RIDDELL, J.:—This is an appeal from the judgment of Mr. Justice Lennox in favour of the plaintiff.

The action is one to set aside or declare void a certain tax sale of land in the city of Port Arthur.

On the facts, I entirely agree with the learned trial Judge that the sale was irregular; and, if it is not saved by legislation, it cannot stand.

The selling was before the 31st December, 1908; the deed after that day and within two years of the commencement of the action.

The defendant relies upon the provisions of the Assessment Act of 1904, sec. 173; and also upon the special Act of 1910, 10 Edw. VII. ch. 124, sec. 4.

As to the first statute, I had occasion recently to consider its effect—in *Sutherland v. Sutherland* (1912), 3 O.W.N. 1368; and I thought that I was bound by a decision of the Court of Appeal to hold that the limit of two years in sec. 173 of the Act of 1904 referred, as its *terminus à quo*, to the deed, and not to the selling.

More recently the Chief Justice of the King's Bench expressed himself as inclined to an opposite opinion: *Burrows v. Campbell*, 23 O.W.R. 271, at p. 273.

In the view I take of the present case, I do not think it necessary to reconsider this point; it is to be hoped that the question may be soon set at rest by a judgment of the Court of Appeal.

This case, in my opinion, is to be decided upon the special Act: and here we are not hampered by authority. In *Sutherland v. Sutherland*, I thought that I was not at liberty to alter the interpretation of certain words already interpreted by the Court of Appeal, simply because a change had been made in another part of the section containing them. But in this statute the words are different, there is no prior statute and no prior decision. In my judgment, sec. 4 of 10 Edw. VII. ch. 124, distinguishes between "sales" and "deeds," i.e., "deeds of lands so sold . . . to convey the said lands so sold." "Sales" before the 31st December, 1908, are validated in the first clause; "deeds" to convey these lands so sold are validated in the second.

We have pointed out in *Smith v. Barff* (1912), 4 O.W.N. 236, ante 276, that "sale" may or may not include the conveyance: in the present statute they are, to my mind, clearly contradistinguished. I think it is sufficient if the selling be before the 31st December, 1908, although the deed be later; and that the plaintiff cannot recover.

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The appeal should be allowed with costs, and the action dismissed, but the dismissal will be without costs.

FALCONBRIDGE, C.J.:—I concur.

BRITTON, J.:—I am of opinion that the appeal must be allowed, upon the sole ground that the sale of the land was validated and confirmed by 10 Edw. VII. ch. 124, sec. 4.

That Act recites that the corporation represented that all tax sales and deeds held and given prior to the passing of that Act should be confirmed. The request was for an Act validating tax sales held and deeds for lands so sold for taxes. Section 4: "All sales of land in the City of Port Arthur made prior to the 31st day of December, 1908, and which purport to be made by the Corporation of the said city for arrears of taxes in respect to lands so sold, are hereby validated and confirmed, and all deeds of lands so sold, executed by the Mayor and Treasurer of the said city purporting to convey the said lands so sold to the purchaser thereof, or his assigns, are hereby validated and confirmed. . . ."

The tax sale at which the land in question was sold was held on the 14th November, 1908, and the sale purported to be made for taxes on the said land for the years 1905, 1906, and 1907, and a deed purporting to convey the said land to the defendant was executed by the Mayor and Treasurer of the said city on the 19th January, 1910.

In this case, and solely by reason of the statute, the defendant is protected.

The appeal should be allowed with costs, and the action dismissed without costs.

*Order accordingly.*



## [DIVISIONAL COURT.]

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*Assessment and Taxes—Tax Sale—Invalidity—Assessment Act, 1904, sec. 165 (2)—Lands of Non-resident—Notice Sent to Wrong Address—Address “Known” to Municipal Treasurer—Address Furnished under sec. 46 and not Revoked.*

Where land of which the plaintiff was the registered owner was sold for taxes, the sale was set aside and the plaintiff was allowed to redeem, after the period for redemption fixed by statute had expired, because the Treasurer of the municipality had not sent to the plaintiff, a non-resident, at the address furnished by him and entered in the Treasurer's books, and not revoked, the notice required by sec. 165 (2) of the Assessment Act, 4 Edw. VII. ch. 23, and the plaintiff had not received any notice—it being held, that the proper address was “known” to the Treasurer, and that it was not a compliance with the statute to send the notice to the address of the plaintiff appearing in the conveyance of the land to him, as if his address was “not known.”

Sections 46, 101, and 165 of the statute considered.

Judgment of RIDDELL, J., reversed.

APPEAL by the plaintiff from the judgment of RIDDELL, J., delivered orally at the conclusion of the trial, at the Toronto non-jury sittings, on the 21st October, 1912, dismissing the action, which was brought to set aside a tax sale by the Corporation of the City of Toronto to the defendant of land formerly in the Town of Toronto Junction and the City of West Toronto, but at the time of the sale in the City of Toronto. The principal ground upon which it was sought to invalidate the sale was, that the notice required by the Assessment Act, 4 Edw. VII. ch. 23, sec. 165(2), was not sent out to the proper address of the plaintiff, the registered owner of the land, and a non-resident.

November 19. The appeal was heard by a Divisional Court composed of BOYD, C., LATCHFORD and KELLY, JJ.

*J. M. Ferguson*, for the plaintiff. The notice required by 4 Edw. VII. ch. 23, sec. 165(2), must be sent to the owner's address “if known to the Treasurer.” The learned trial Judge was wrong in finding that the address of the plaintiff was not known to the Toronto Treasurer. The Treasurer knew, by information, the plaintiff's last New York address; and, as the plaintiff's notification of that address had not been revoked, that is the place to which the notice should have been sent, even

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if letters which had been sent there by the Treasurer of Toronto Junction and West Toronto, as alleged, were returned unopened: 4 Edw. VII. ch. 23, sec. 46 (6). The notice addressed to the plaintiff at Toronto was not a compliance with sec. 165.

*A. J. Anderson*, for the defendant. The notice was sufficient. The two letters sent by the former Treasurer to the plaintiff, at the New York address, and returned, were a substantial compliance with the requirements of sec. 165, though sent earlier than was necessary. The learned trial Judge was right in finding that the plaintiff's address was unknown to the Toronto Treasurer. That official was, therefore, correctly following the Act in posting the notice to the address obtained from a search in the Land Titles office, namely, Toronto.

*Ferguson*, in reply.

December 24. LATCHFORD, J.:—The plaintiff purchased the lands in question in 1892, when he resided in Toronto. They were unoccupied lands; and at the time were comprised within the limits of the Town of Toronto Junction, which became in 1908, by 8 Edw. VII. ch. 118, the City of West Toronto. About 1894, Gast went to the City of New York, where he has since resided. The Assessor for both municipalities was aware that Gast was a "non-resident;" and had notice that his address was 136 Liberty street, New York.

Under the Assessment Act of 1892, 55 Vict. ch. 48, sec. 47, the Assessor was obliged "before the completion of his roll . . . to transmit by post to every non-resident who has required his name to be entered thereon, and furnished his address to the Clerk, a notice of the sum at which his . . . property has been assessed." A similar provision is contained in sec. 51 of the Assessment Act in the revision of 1897, ch. 224. In the Assessment Act of 1904, 4 Edw. VII. ch. 23, the notice is required—sec. 46, sub-sec. 3—to be transmitted by post to the non-resident's address, "if known." Each of the Acts of 1892 and 1897 provides that the owner of unoccupied land may give the Clerk of the municipality notice of his address, and require his name to be entered on the assessment roll for the land of which he is the owner: 55 Vict. ch. 48, sec. 3; and

R.S.O. 1897, ch. 224, sec. 3. Section 46 of the consolidation of 1904 provides (sub-sec. 6) that in case any person assessed furnishes the Assessment Commissioner, or, if none, the Clerk, with a notice in writing giving an address to which the notice of assessment may be transmitted to him, and requesting the same to be so transmitted to him by registered letter, the notice of assessment shall be so transmitted. Then the last-cited enactment proceeds: "and any notice so given to the Assessment Commissioner or Clerk, as the case may be, shall stand until revoked in writing." The provision in sec. 3 of the earlier Acts is: "It shall not be necessary to renew such notice from year to year, but the notice shall stand until revoked, or until the ownership of the property shall be changed."

It is in evidence and uncontradicted that the plaintiff notified the Treasurer of the Town of Toronto Junction that his address was 136 Liberty street, New York. Upon the Collector's rolls of each of the three municipalities which had in succession the right to impose and collect taxes on the lands of the plaintiff, that address appears unrevoked. To him, at that address, as required "if known," were sent the statutory notices of his assessment. To him, at that address, were also transmitted from time to time the "statement and demand of the taxes charged against him in the Collector's roll," necessary to be addressed in accordance with the notice given by such non-resident, if such notice has been given: sec. 101 of 4 Edw. VII. ch. 23.

Here I venture to express the opinion that the plaintiff was not required by sec. 101 to file a new notice of his address. His address stood unrevoked upon the Assessor's and Collector's rolls, and the statement and demand called for by the statute were required to be sent to him there. They were in fact so sent. The plaintiff produced at the trial statutory notices from the Town of Toronto Junction for 1906 and 1907; from the City of West Toronto for 1908; and from the City of Toronto for 1909, 1910, and 1911—each and all addressed to him at the address standing unrevoked upon the Assessor's and Collector's rolls of the several municipalities as the address and the only address of the plaintiff.

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That he had in fact a different address in New York, I regard as wholly immaterial. His address as formally made known to the municipalities, as known and recognised by them—except in one instance—was 136 Liberty street, New York; and all the statutory notices there addressed to him were duly received by him.

The exception referred to was made when, a year after the sale for taxes, the defendant applied to the City of Toronto for a deed of the lands which he had purchased. It then became the duty of the Treasurer, under sec. 165, before executing the deed, to search in the registry office and in the Sheriff's office and ascertain whether or not there were mortgages or other incumbrances affecting the lands, and who was the registered owner of the lands.

The Treasurer had the prescribed searches made. It appears that there were no incumbrances. The plaintiff was registered as owner of the lands. Sub-section 2 of sec. 165 requires the Treasurer to send to the registered owner, "by registered letter mailed to the address of such . . . owner . . . If known to the Treasurer, and, if such address is not known to the Treasurer, then to any address of such . . . owner appearing in the . . . deed, a notice stating that the . . . owner is at liberty within thirty days from the date of the notice to redeem the estate sold. . . ."

Mr. Fleming, of the City Treasurer's office, Toronto, has charge of the collection of all arrears of taxes. He made inquiry of James T. Jackson, who had been Treasurer of Toronto Junction and West Toronto, regarding the plaintiff's address. Why he should have so inquired, when the plaintiff's address appeared upon the assessment rolls of the City of Toronto at the time, is not clear. Jackson told Fleming that he had written, in the year following the sale, two letters to the plaintiff at 136 Liberty street, New York, and that these letters were returned as undelivered. Jackson did not make copies of the letters, or a record of their dates, nor did he preserve them when returned. His evidence regarding them is accepted as true by the learned trial Judge. It is not pretended, however, that these letters were more than friendly intimations to the owner that



his lands had been sold, nor is it suggested that they were sent in conformity to the requirements of sec. 165.

Fleming's evidence is brief, as to his interview with Jackson, and may be quoted in full:—

“His Lordship: Who is Mr. Jackson? A. He was Treasurer of West Toronto; and, when we came to search through the lands in default the next year, we consulted him with reference to them to see if he could give us any information, and he told me that the two years he had sent it to—

“His Lordship: Subject to objection.

“Witness: They had been returned from that address, 136 Liberty street, New York, so all we could do was to send them according to what information was there.”

His Lordship, in his reasons for judgment, summarises the conversation: “Jackson told Fleming what was the truth, as I find—that he had sent on notices (the letters) himself to Mr. Gast at this address, 136 Liberty street, New York, and that they had been returned to the post-office, not having been called for. That being so, the address of the owner was not known to the Treasurer.”

With great respect, I am of a different opinion. It seems clear to me that Fleming was informed that: (1) the owner's address was 136 Liberty street; (2) two letters so addressed to him were received back by the sender. Mr. Fleming had knowledge that certain letters addressed to the plaintiff at 136 Liberty street, New York, had not reached the plaintiff; but he also had knowledge that 136 Liberty street, New York, was the address of the plaintiff. With that knowledge in his mind, he chose not to transmit to the plaintiff at that address the notice required to be sent under sec. 165, and addressed it, instead, to Toronto—a course he could properly pursue only when the address was not known to him.

The whole salutary purpose of sec. 165—the last opportunity for redemption—“betwixt the stirrup and the ground,” “*inter pontem et fontem*”—would, in my opinion, be rendered nugatory if municipal Treasurers were permitted, in cases like this, to disregard the unrevoked address of a non-resident owner of record under the statute upon the books of the municipality

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—merely because they have information that letters or notices so addressed have failed to reach their destination.

The notice addressed to the plaintiff at Toronto was not, in my humble judgment, a compliance with the requirements of sec. 165.

The plaintiff should be allowed in to redeem on the usual terms.

I would allow his appeal with costs here and below.

BOYD, C.:—The scheme of the Municipal and Assessment Acts contemplates and provides for a continuity of official life in the finance department. The department attends to the raising of money for municipal purposes, and is administered by various officers: Treasurer, Collectors, Assessors, and the like; each has his own functions, yet all are to work together for one and the same end. Pains are taken at the outset to provide for the proper discharge of the fundamental work of assessment; and, as one of the incidents, to make sure of the identification of the ratepayer by name and address. This is to safeguard him in regard to all notices and demands requiring personal service, or, in the case of non-residents, service by post and registered letter. As to non-residents, they can notify the department of their post-office address, and this is to be the continuing place of address till a change is made by the person himself. The address so communicated to the department is applicable to and is meant to apply to all stages of the proceedings in the imposing and levying of taxes, even till the ultimate outcome, when the lands are being disposed of to pay the arrears. This preamble is pertinent to the case in hand.

This land was sold for taxes under the special power given by the statute of 1898, 61 Vict. ch. 55, sec. 16, by which lands of non-residents in the town of Toronto Junction might be sold if the taxes were in arrear for twelve months; as against the three years' grace given by the general Assessment Act.

The plaintiff had bought the lands in 1892, and had paid taxes for fifteen years, but made default in 1906 and 1907; and the sale took place in November, 1908. He did not know of the time being shortened by statute—as he had left Toronto for

New York about 1894. Before leaving, he notified the assessment department and the Treasurer of his New York address, "136 Liberty street;" and this was never changed by him, although he, some time after, had an address "80 John street, N.Y." The situation is correctly summed up by him in a letter addressed to the purchaser, in March, 1910, when he found out that the land had been sold. He says: "I could hardly believe this, as I had never been notified that this sale was going to take place, although my address had been with the Tax Collector all these years, and he had always sent me assessment notices and the tax assessments."

He puts in, as addressed to and received by him at 136 Liberty street, New York, assessment notices and demands for payments of taxes in a continuous series from 1906 to 1911, the last being in a registered letter post-marked in April, 1911. The only exceptions which appear in the evidence are two friendly letters sent by the Treasurer after the sale, and calling attention to it, some time in the year 1909, prior to the expiration of twelve months from the sale. These were addressed to Liberty street—I suppose not registered—and both came back to the Treasurer, Jackson. No copies were kept, and no such letters were received by the plaintiff. But the others, all of official character, and I suppose registered, were duly received by him up to 1911.

The land was originally situate in the town of Toronto Junction; in 1908, its *locale* was changed to the city of West Toronto; and in 1909 that city was annexed to and became a part of the city of Toronto. Jackson was the last Treasurer who conducted the sale; and, after the absorption, he was placed in a prominent position in the office of the City Treasurer. After the sale, the tax deed had to be given by the Corporation of the City of Toronto, and this was the first and only time that the city officials had to do with that West Toronto tax sale. The officer charged with the collection of arrears, Mr. Fleming, says: "We consulted Mr. Jackson, the (former) Treasurer, in all these matters." Mr. Jackson told of his experience with the two unofficial letters, and, as a result, without further investigation,

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so far as appears, the all-important notice required by the statute of 1904, 4 Edw. VII. ch. 23, sec. 165 (2), was posted to the address derived from the Land Titles office, which was "T. J. Gast, Manufacturer, Toronto." This notice, of course, came back to the Treasurer, and the last chance for redemption disappeared.

Jackson, when asked as to the letters he sent being addressed to Liberty street, answered, "The only address I ever knew." Such is the precise fact; that is the only address he knew, and that was the address lodged with the department by the plaintiff as his address; and that direction the plaintiff never revoked.

The learned Judge finally held that the address of the plaintiff was not known to the Treasurer (for the time being). That conclusion, on this evidence, I am unable to follow. The statutory notice called for by sec. 165, which is an essential prerequisite before the right of redemption can be extinguished by a tax deed, is to be sent to the owner's address, "if known to the Treasurer." What is the meaning of that? Not his personal knowledge as an individual, but the knowledge which he possesses or is required to possess as an official. Here the new Treasurer knew nothing *per se* of the address of a West Toronto tax-payer, but he was required to possess himself of the knowledge possessed by the department which was taken over by the city. The evidence is simply overwhelming that to the Municipality of Toronto Junction, later West Toronto, and the Treasurer, Assessors, and Collectors and clerks of that place, the address and the only address they could regard was that given by the plaintiff and known to them all and acted on by them all for nearly twenty years. None of the official notices in all these years had miscarried or been returned to the senders. Why was there a break as to this most important of all the statutory notices required? A lame excuse is given: granting the truth of all said by Jackson, at most it is that two private letters did not get to an address given by the plaintiff. That did not import a revocation; it may have given rise to a doubt as to whether the address was a right one, and such a doubt may relieve the officer or the Treasurer from a charge of culpable mistake, but it does not exonerate either from fulfilling the



statutory requirement. They knew the address given by the plaintiff, and they should have acted as theretofore in sending the official notice to that and no other address. It would then have been received by the plaintiff, and his land would have been redeemed. The mandate of the plaintiff was to send to that address; that was, as contemplated by the statute, the then current address; and, whatever the doubt may have been as to its reaching him, that did not justify the ignoring of it and making search after an obsolete address in the records of the Land titles office, which was applicable to the whereabouts of the plaintiff in 1892. Had they exercised any reflection, it would have been obvious that such a manner of picking and choosing could only serve to frustrate the real intention of the law, viz., to bring the exigency of affairs home to the person most interested.

The judgment should be reversed; the plaintiff's right to recover the land established, on payment of the proper statutory charges claimable by the purchaser and other taxes paid by him, which may be settled by the Registrar, if the parties do not agree—and then to be deducted from the costs of action and appeal, to be paid by the defendant.

I agree with my brother Latchford and take advantage of the detailed account of the law which he has given, and thereby avoid repetition.

KELLY, J.:—I agree with the conclusions arrived at by my learned brothers. The failure of the City Treasurer to recognise the New York address of the plaintiff, as it appeared in the books of the assessment office and in the books of the City of West Toronto, in use before its annexation to the City of Toronto, was fatal to the completion of a valid tax sale to the defendant.

The Assessment Act meets just such a case as this. The material parts of the Act, as well as the facts of this case, are sufficiently set forth in the reasons for judgment of my brother Latchford, and I need not repeat them.

The false step made in the Treasurer's department was in ignoring the address of the plaintiff—136 Liberty street, New

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York—as it appeared in the books of the municipality, and in relying on information received from James T. Jackson that two letters written by him to the plaintiff at that address had been returned to the writer undelivered to the plaintiff.

These letters were written within a year after the time the tax sale was held. At the time of the sale, the lands were within the City of West Toronto, of which Jackson was the Treasurer. He says that 136 Liberty street, New York, was the only address of the plaintiff that he knew, and that he received no letter notifying him of any change of address.

Subsequent to the sending of the letters by Jackson, statutory notices of assessment and demands of taxes were sent by the city to the plaintiff at this same address, and none of them were returned. With this is to be considered the fact that the books of the City of West Toronto and of the City of Toronto contained this address of the plaintiff, which the city recognised and made use of in sending these notices and demands, and that no written notice of change of address had been given, as required by 4 Edw. VII. ch. 23, sec. 46, sub-sec. 6.

The Treasurer, attaching importance to the return of the letters sent by Jackson, and ignoring the address shewn in the books, assumed that the plaintiff's address was unknown, and proceeded to carry to completion the tax sale on that assumption.

— The plaintiff had a right to expect that, until he gave the notice changing his address, in compliance with the requirements of the Act, the address appearing in the books would be recognised, and that he would not be put in peril of losing his right to redeem his property until the thirty days' notice required by sub-sec. 2 of sec. 165 of the Assessment Act, would be given to him at that address.

That the notice was not so given is, in my opinion, fatal.

The appeal should be allowed, and the plaintiff be given the right to redeem the property in the manner and on the terms set out by the learned Chancellor.

*Appeal allowed.*

## [DIVISIONAL COURT.]

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Dec. 28.

*Liquor License Act—Licensed Hotel-keeper—"Disposal" of Intoxicating Liquor on Sunday—Sec. 54 of Act.*

A bottle of whisky was bought from the defendant, a licensed hotel-keeper, upon his premises, and paid for, on a Saturday before seven o'clock p.m., but was kept upon the premises until the following day, Sunday, and then delivered to the purchaser:—

*Held*, that there was a "disposal" of the liquor on Sunday, contrary to sec. 54 of the Liquor License Act, R.S.O. 1897, ch. 245 (6 Edw. VII. ch. 47, sec. 13).

*Noblett v. Hopkinson*, [1905] 2 K.B. 214, followed.

APPEAL by the prosecutor, under sec. 120 of the Liquor License Act, R.S.O. 1897, ch. 245, from the judgment of the Judge of the District Court of the District of Algoma, dismissing an appeal from the order of the Police Magistrate for the district dismissing a complaint against the defendant for selling or disposing of intoxicating liquor contrary to the provisions of sec. 54 of the Act.

The sale or disposal complained of was made by the defendant, a licensed hotel-keeper, to one Morrison, who paid for a bottle of whisky on a Saturday, but left it upon the defendant's premises, where it was delivered to him upon the following day, Sunday.

November 1. The appeal was heard by a Divisional Court composed of MULOCK, C.J.Ex.D., SUTHERLAND and MIDDLETON, JJ.

*J. R. Cartwright*, K.C., for the prosecutor, argued that, upon the evidence, the case came clearly within the provisions of sec. 54 of the Liquor License Act, as involving a "sale or other disposal" of the liquor in question. The words "other disposal" must receive a liberal and not a mere technical construction: *Regina v. Walsh*, (1897), 29 O.R. 36; *Noblett v. Hopkinson*, [1905] 2 K.B. 214.

The respondent (defendant) did not appear and was not represented by counsel.

December 28. MULOCK, C.J.:—The respondent, the keeper of a licensed tavern in the village of Ryderback, sold one Mor-

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risson a bottle of whisky between the hours of six and seven p.m. on Saturday the 13th day of April. The purchaser then paid for, but did not remove, the liquor, which "was laid away" for him by the respondent in his kitchen in the hotel. The next day (Sunday) the purchaser called for the liquor, when the respondent took it from the kitchen and delivered it to him in the hotel hall.

Section 54 of the Liquor License Act, R.S.O. 1897, ch. 245 (as enacted by 6 Edw. VII. ch. 47, sec. 13), is as follows: "Subject to the provisions hereinafter contained, in every place where intoxicating liquors are authorised to be sold by wholesale or retail, no sale or other disposal of such liquors shall take place therein, or on the premises thereof, or out of or from the same, to any person or persons whomsoever from or after the hour of seven of the o'clock on Saturday night until six of the o'clock on Monday morning thereafter," etc.

The neat question here to determine is, whether the act of the respondent, in handing to the purchaser the bottle of whisky in question in the hall of the hotel on Sunday, was a "sale or other disposal," within the meaning of this section.

The sale was completed on the Saturday; and, for the purposes of this appeal, it may be conceded that the property in the liquor then passed to the purchaser, although he did not obtain actual possession until the next day, Sunday. In the meantime the hotel-keeper had the actual custody of the liquor. As said by Wills, J., in *Pletts v. Beattie*, [1896] 1 Q.B. 519, 523: "The provisions of the Licensing Act were not framed with a regard to the niceties which sometimes enter into the consideration of a contract for goods sold and delivered."

The learned Judge has dealt with this case as if it turned upon the question of title to the liquor. The actual sale may have given the purchaser title to it; but the Act prohibits more than mere selling; and, in view of its aim, a liberal construction should be placed on the words "or other disposal."

In my opinion, these words as here used are intended to include transactions respecting liquor whether or not connected with its sale. If the words were to be given the narrow construction contended for by the respondent, the object of the



Act, in seeking to suppress the traffic in liquor on Sunday, could readily be defeated. Any person desiring to obtain liquor on Sunday could complete his purchase within lawful hours on Saturday, leaving the liquor then purchased in the hotel until Sunday, and then call and obtain it. The legislation in question does not, I think, contemplate a licensed hotel becoming a base for such operations, and I interpret them as covered by the prohibitory words "or other disposal." The word "disposal" is not here used in a strictly technical but in a liberal sense. According to the dictionaries, it has many meanings; some of them associated with selling, others with the mere matter of possession. The following are some of the meanings given by the dictionaries: "An act disposing of something by gift, sale, conveyance, transfer, or the like; the act of putting away, getting rid of, settling, or definitely dealing with; bestowing, giving, making over, alienation, or parting with sale or the like," etc.

The handing of the bottle of whisky to the purchaser was a transfer of the actual possession of it, and as such was, in my opinion, an act of disposal prohibited by the section.

I, therefore, think this appeal should be allowed, with costs here and below, and the case should be referred back to the magistrate to be dealt with.

SUTHERLAND, J.:—The facts as set out in the judgment are as follows: "On Saturday the 13th April, 1912, one Morrison purchased from the respondent a bottle of whisky. Shortly afterwards he returned for another bottle. The respondent, thinking that he had had enough, refused to sell him another bottle. Morrison then said that he did not want to drink it then, but wanted it to take with him to a certain lumber camp on the following day; whereupon the respondent then sold him a bottle of whisky, and received the pay for the same. The respondent took the bottle and placed it in the kitchen of his hotel, to be handed to Morrison when he called the next day. Morrison called the next day and obtained the bottle from the respondent."

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The learned District Court Judge considered that "the sale was complete on the Saturday before seven p.m., and delivery also complete." In arriving at this conclusion, he relied upon the language of Parke, J., in *Dixon v. Yates* (1833), 5 B. & Ad. 313, at p. 340: "But where, by the contract itself, the vendor appropriates to the vendee a specific chattel, and the latter thereby agrees to take that specific chattel, and to pay the stipulated price, the parties are then in the same situation as they would be after the delivery of the goods in pursuance of a general contract. The very appropriation of the chattel is equivalent to delivery by the vendor, and the assent of the vendee to take the specific chattel, and to pay the price, is equivalent to his accepting possession."

His attention was apparently not directed to the comparatively recent case of *Noblett v. Hopkinson*, [1905] 2 K.B. 214. The facts of this case, as set out in the head-note, are as follows: "Two men went into a public-house on Saturday before closing time, and asked if they could have half a gallon of beer and if it could be delivered the next morning to them at the place where they were working; on being told that they could, they paid for the beer. The beer was directly afterwards drawn and put into a bottle, which was kept during the night in a building within the curtilage of the licensed premises, and was taken by the barman on the Sunday morning during prohibited hours and delivered to the purchasers." This case seems to be in point, and decides that, even if there had been a complete appropriation on the Saturday, the licensee would, nevertheless, be "liable to be convicted, on the ground that delivery of the beer on Saturday was an essential condition to the purchase, and that by opening his premises on that day for the carrying out of a material part of the contract of sale he had opened them during prohibited hours." At p. 219, Lord Alverstone, C.J., says: "This point really depends upon the question whether we are to adopt the test laid down by Channell, J., in *Saunders v. Thorney* (1898), 78 L.T.R. 627, where he says: 'I think that a person opens his licensed premises, within the meaning of the section, when he opens them for the carrying out of any material part of the transaction of sale.' Personally, I adopt that view,

and think that if any part of the bargain of sale involves the opening or keeping open of the premises for delivery of the goods on Sunday, the case falls within the mischief of the section." And Kennedy, J., at p. 222, says: "I confess that I should go further, and, as at present advised, should be prepared to hold that, if on a Saturday night a man were to point to one in a row of bottles in the bar of a public-house and say that he wanted that particular bottle and would pay for it now but it must be delivered to-morrow during prohibited hours, the so delivering it would be carrying out an essential part of the transaction of sale, and the case would be within the section, although in such a case there would be an appropriation of the chattel."

In the same way here, a material part of the transaction was the delivery on the premises within the prohibited hours. I think that the section in question is wide enough in its terms to cover a case like this. Indeed, to hold otherwise would be to open up a ready means to defeat what would appear to be the plain intention of the enactment.

I would allow the appeal with costs.

MIDDLETON, J.:—What took place in this case, as stated by the learned District Court Judge, was, that on Saturday the 13th April, at six p.m., one Morrison purchased from the accused a bottle of whisky. Shortly afterwards he returned to purchase another bottle. The accused, thinking that Morrison had had enough whisky, refused to sell him another bottle. Morrison then said he did not want to drink it then, but wanted to take it with him to a lumber camp on Sunday; whereupon the accused sold him a bottle of whisky and received the price. The accused then took the bottle to the kitchen of his hotel, and gave instructions that it should be handed to Morrison when he called for it on Sunday. On Sunday, Morrison called and obtained the bottle.

The learned District Court Judge has taken the view that this case must be determined upon the principles applicable where the controversy is as to the passing of property in a chattel sold. Applying these principles, he holds that the

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vendor had sufficiently appropriated to the vendee the specific chattel in pursuance of the contract, and that the sale was completed on Saturday.

I think that this is fallacious; and that, when the object of the enactment is borne in mind, this is giving too narrow a construction to the prohibition found in the statute, and is calculated to defeat the purpose of the legislation.

In *Noblett v. Hopkinson*, [1905] 2 K.B. 214, a very similar question was discussed. There, on Saturday, the customers bought beer, to be delivered to them on Sunday. They paid for the beer on Saturday. It was immediately drawn, and was kept during the night within the curtilage of the premises, and on Sunday was delivered by the barman to the purchasers. Two questions were discussed: first, had there been a sufficient appropriation of the beer to the purchasers on the Saturday? and, secondly, assuming a complete appropriation on Saturday, should the accused have been convicted? The Court thought that there had not been a sufficient appropriation. The majority of the Court, Lord Alverstone, C.J., and Kennedy, J.—Ridley, J., dissenting—also expressed the opinion that, even if there had been a complete appropriation of the beer on Saturday, the licensee was nevertheless liable to be convicted. Lord Alverstone said (p. 219): “This point really depends upon the question whether we are to adopt the test laid down by Channell, J., in *Saunders v. Thorney*, 78 L.T.R. 627, where he says: ‘I think that a person opens his licensed premises, within the meaning of the section, when he opens them for the carrying out of any material part of the transaction of sale.’ Personally, I adopt that view, and think that if any part of the bargain of sale involves the opening or keeping open of the premises for the delivery of the goods on Sunday, the case falls within the mischief of the section. I have come to the conclusion that when Doherty was in the public-house on the Saturday evening he bargained as a condition of his buying the beer that it should be delivered from the public-house on the Sunday morning.”



In this case it was part of the transaction that the whisky should be delivered on Sunday; and, I think, this is within the prohibition of the statute. The delivery on Sunday was an essential and integral part of the sale.

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*Appeal allowed with costs.*

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[DIVISIONAL COURT.]

TAYLOR v. YEANDLE.

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Dec. 28.

*Gift—Deed of Land—Parent and Child—Absence of Undue Influence—Action by Administratrix of Mother to Set aside Deed—Evidence—Testimony of Donee—Settlement—Affirmance—Will—Failure to Prove—Revocation of Letters of Administration—Jurisdiction.*

In February, 1907, a conveyance of land was made to the defendant by her mother, who died in March, 1911. On the same day that the deed was executed, the mother made a will by which she gave all her estate to the defendant. This will was never revoked, but it was not proved, and letters of administration to the estate of the mother were granted to the plaintiff, who brought this action to set aside the deed. The mother had lived with the defendant for some years before the will was made and so continued until her death:—

*Held*, upon the evidence, independently of the defendant's own testimony, that the execution of the deed was the free act of the mother; that there was no undue influence by the daughter; that the mother intended by the deed to compensate the daughter for her trouble and care; that it was a fair and reasonable settlement; and that it was too late to attack it after she had affirmed it by continuing to live with the defendant for four years after its execution.

*Walker v. Smith* (1861), 29 Beav. 394, followed as to not taking into account the testimony of the recipient of a gift.

*Semble*, that the letters of administration might be recalled and the will admitted to probate; but the High Court had no jurisdiction to revoke the grant.

*McPherson v. Irvine* (1895), 26 O.R. 438, referred to.

APPEAL by the plaintiff from the judgment of BOYD, C., who tried the action without a jury, dismissing it with costs, at the close of the trial, on the 15th October, 1912.

The action was brought by the administratrix of the estate of Eleanor Doherty, deceased, to set aside a conveyance of land made by the deceased to her daughter, the defendant, as having been obtained by the fraud and undue influence of the defendant.

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December 6. The appeal was heard by a Divisional Court composed of MULOCK, C.J.Ex.D., CLUTE and SUTHERLAND, JJ.

*R. S. Robertson*, for the plaintiff, argued that the deed from the mother to the daughter should be set aside, as it was a purely voluntary gift, and there was not sufficient evidence to support it without relying upon that of the defendant, which should not be allowed to be taken into account: *Lavin v. Lavin* (1880), 27 Gr. 567; *Walker v. Smith* (1861), 29 Beav. 394. There was undue influence: *Irwin v. Young* (1881), 28 Gr. 511; Kerr on Fraud, 4th ed., p. 456; *McKay v. McKay* (1880), 31 C.P. 1; *McCaffrey v. McCaffrey* (1891), 18 A.R. 599.

*G. G. McPherson*, K.C., for the defendant, contended that the judgment below, sustaining the deed, was correct. There was not the least evidence of undue influence on the part of the daughter. Besides, the deed was affirmed by a will made by the mother on the same day as the deed. This will had never been proved; but it evidenced the mother's intention.

*Robertson*, in reply. As to the will, letters of administration of the mother's estate were granted declaring that the deceased died intestate. The High Court could not set them aside. Therefore, the High Court could not prove the will: *McPherson v. Irvine* (1895), 26 O.R. 438.

December 28. The judgment of the Court was delivered by CLUTE, J.:—The action was brought to set aside a deed, dated the 20th February, 1907, made by the late Eleanor Doherty, who died on the 7th March, 1911, to her daughter, the defendant. The deed was attacked chiefly upon the ground that it was a gift from the mother to the daughter, and that there was not sufficient evidence to support it without relying upon that of the daughter, which could not be looked at for that purpose.

In *Lavin v. Lavin*, 27 Gr. 567, which was strongly relied upon, reference is made to the judgment of Lord Romilly, in *Walker v. Smith*, 29 Beav. 394, 396, where he is reported as saying: "I am of opinion that in all these cases you must not take into account the evidence of the recipient himself. The gift must be established by separate and independent evidence,

and if there was separate and independent evidence here I could uphold the gift." Spragge, C., further says that he followed this decision in *Delong v. Mumford* (1878), 25 Gr. 586.

On referring to *Walker v. Smith*, it will be seen that it was a case between solicitor and client, where the testatrix had made a will, prepared by the solicitor, by which she gave legacies of £500 each to the solicitor, his wife and their son and daughter, and the residue to her sisters, and appointed Mr. Smith, the solicitor, her sole executor. The will was attested by two clerks of the solicitor. Shortly afterwards, the testatrix made a voluntary gift to Mr. Smith of £500 of East India stock, which was transferred into his name on the 18th September, 1857; and on the 28th September, 1857, she gave Mr. Smith a power of attorney to receive the dividends on her New Three per Cents, which he received. She died on the 29th October, 1857. The transactions were kept secret, and no other independent solicitor was employed in them. The family asked a declaration that the gifts and bequests had been improperly obtained and were void.

The Master of the Rolls, in laying down the principle to be applied to cases of that kind, states that "there are always two points to be considered in these cases. First, whether the donor really made the gift; and, secondly, whether the influence of the donee or recipient of the bounty was improperly exercised on the donor. . . . The burthen of proof of the first always lies upon the recipient of the bounty, to shew that the gift was intended to be given, and I fully concur in the argument and observation, that a solicitor does not stand in any different situation from any other person, and that there is nothing *ipso facto* in the relation of solicitor and client which makes it impossible for a solicitor to receive a gift from his client. But when the gift has been fully established, the question then arises, whether undue influence has been exercised; and then the fact of the relation of solicitor and client is an ingredient in estimating the extent of the actual or probable influence exercised over the donor."

In that case he did not find any undue influence, and held that "in all these cases, you must not take into account the

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evidence of the recipient himself; the gift must be established by separate and independent evidence;" and he observes that "if there were separate and independent evidence here, I should uphold the gift." He found that, as to the will, there was not in evidence any proof of undue influence, and upheld the will. He set aside the gift, however, of the £500 East India stock, saying that that stood upon a totally different footing. "Undoubtedly, if she had called in a third person who had no interest in the matter, and said, "I have deliberately given this £500 to Mr. Smith, for the benefit of himself and his children or for his own benefit exclusively," then I should have upheld the gift. But I look in vain for any such thing in this case. I will go through the whole of the evidence; but, as I have stated, I am compelled to throw out of consideration the evidence of Mr. Smith himself. Unfortunately, the whole matter was kept secret, and the evidence shews that she wished it to be concealed. Unfortunately, the effect of this is to destroy that which alone could support the gift, viz., evidence that the gift was really made. The result was that the bequest under the will was sustained and the gift of East India stock was set aside.

This authority, having regard to the facts in the present case, supports, I think, the decision of the Chancellor. Here the mother had resided with the daughter for some years before the will was made, and continued to reside with her for four years afterwards and until her death. The Chancellor finds that the mother, in the first instance, through her brother, asked Mr. Davidson—the solicitor who drew the conveyance in question—to come and see her. The defendant was not present when the deed was made; she took no part in it. The solicitor came; and states that the transaction was entered into by the mother herself, who gave him the instructions, and this was some six or seven years after she had gone to live with the daughter. She was well satisfied with the care which her daughter took of her, and during this earlier period she made a note for \$500 payable to her daughter. Quite independently of the defendant's evidence, the execution of the deed seemed to be the free act and will of the mother, and, as the circumstances have proved, a reasonable and fair settlement. Whatever view might



have been taken of the case, had the mother been dissatisfied with her treatment and sought in her lifetime to set aside the deed, it is, I think, under the circumstances of this case, too late after she had affirmed it by continuing to live with her daughter for over four years.

In this case, differing from *Walker v. Smith*, there was no secrecy. The deed was made on the 20th February, 1907, and registered on the 20th April of the same year. There was no evidence whatever of undue influence on the part of the daughter; and there is the further fact that, on the same day that the deed of the property in question was given, the mother made a will by which she gave to her daughter, the defendant, all her estate, real and personal, of which she might die possessed. This will was duly executed and never revoked.

It is true that it has not been proved and letters of administration have been granted to the plaintiff. This occurred for the reason that no proper inquiry or search for the will was made prior to the application for letters of administration. The mother died on the 7th March, 1911; and letters were granted on the 20th April of the same year.

There was no evidence offered to impugn this will, and no reason presented to the Court why it should not be admitted to probate and the letters recalled. But this Court has no jurisdiction to revoke the grant. See *McPherson v. Irvine*, 26 O.R. 438; and see *Empey v. Fick* (1907), 13 O.L.R. 178, 15 O.L.R. 19, where the difference is pointed out in the position of a plaintiff who seeks to set aside an improvident deed made by herself and where relief is sought after her death by her personal representatives.

From the evidence, I think, it cannot be doubted that the transaction as it actually took place and was worked out was for the benefit of the mother; she was satisfied with it during her life. It is obvious from the evidence, I think, that she intended from the first to compensate the daughter for her trouble and care; and the amount which the daughter received was no more than a reasonable compensation.

I think this appeal should be dismissed with costs.

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## [DIVISIONAL COURT.]

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BORNSTEIN v. WEINBERG.

Dec. 28.

*Landlord and Tenant—Covenant by Tenant to Repair—Construction —  
Breach—Damages—Ordinary Wear and Tear.*

In an action by landlord against tenant for breach of a covenant contained in an informal lease of a house and land, whereby the tenant, who was to receive the premises "in the best condition," undertook "to give up the house in the same condition and repairs:"—

*Held*, that, in computing the damages for the breach, an allowance should be made to the landlord for ordinary wear and tear; there was no warrant for reading an exception into the undertaking.

*Lurcott v. Wakely & Wheeler*, [1911] 1 K.B. 905, followed.

APPEAL by the plaintiffs from the judgment of DENTON, Jun. Co.C.J., in an action, brought in the County Court of the County of York, by the owners of the house and lot No. 82 Elizabeth street, in the city of Toronto, to recover from the defendant, who had been the tenant of the premises, damages for breach of a covenant in the lease. The County Court Judge gave judgment for the plaintiffs for \$76.50 damages and for costs; and they appealed on the ground that the damages should be larger.

December 17. The appeal was heard by a Divisional Court composed of BOYD, C., LATCHFORD and MIDDLETON, JJ.

*L. M. Singer*, for the plaintiffs, argued that the learned trial Judge, who had allowed the plaintiff \$76.50 damages, was wrong in reading into the lease the words "reasonable wear and tear excepted." The tenant had undertaken to give up the house, on leaving, "in the same condition and repairs" as when he entered, and this undertaking was absolute. He referred to Bell on Landlord and Tenant, p. 470; *Delamatter v. Brown Brothers Co.* (1905), 9 O.L.R. 351; Halsbury's Laws of England, vol. 18, p. 507; 24 Cyc. 1085; *Crawford v. Bugg* (1886), 12 O.R. 8; Foa on Landlord and Tenant, 3rd ed., p. 202; *Wright v. Goddard* (1838), 8 A. & E. 144; *Davies v. Davies* (1888), 38 Ch.D. 499; Encyc. of the Laws of Eng., vol. 7, p. 669; *Thorpe v. Milligan* (1857), 5 W.R. 336; *Terrell v. Murray* (1901), 17 Times L.R. 570; *Manchester Bonded Warehouse Co. v. Carr*

(1880), 5 C.P.D. 507, at p. 512; *Proudfoot v. Hart* (1890), 38 W.R. 730, at p. 732.

*A. R. Hassard*, for the defendant, contended that the judgment should not be disturbed, because, even admitting the plaintiffs' contention that they were entitled to something, it was manifest that the amount claimed was grossly exaggerated. As to the lease, all that the plaintiffs were entitled to was to receive back the premises in the state in which they handed them over to the tenant; and the evidence shewed that they did. The exception of reasonable wear and tear was implied, because it was only natural to suppose that the house would necessarily depreciate somewhat.

*Singer*, in reply.

December 28. The judgment of the Court was delivered by MIDDLETON, J.:—The action was brought by the landlords against a tenant for breach of a covenant contained in an informal lease in the Yiddish tongue, by which the tenant of No. 82 Elizabeth street—who was to receive the premises “in the best condition”—undertook “to give up the house in the same condition and repairs.”

The learned Judge has allowed damages to the plaintiffs, excluding in his computation damages attributable to ordinary wear and tear.

I do not think that the learned Judge is warranted in reading this exception into the undertaking, which is in form absolute. The extent of the obligation of a tenant under a repairing lease is discussed in the recent case of *Lurcott v. Wakely & Wheeler*, [1911] 1 K.B. 905, where the Court of Appeal review most of the earlier authorities.

In *Gutteridge v. Munyard* (1834), 1 Moo. & R. 334—a *nisi prius* decision—Tindal, C.J., said: “Where a very old building is demised, and the lessee enters into a covenant to repair, it is not meant that the old building is to be restored in a renewed form at the end of the term, or of a greater value than it was at the commencement of the term. What the natural operation of time flowing on effects, and all that the elements bring about in diminishing the value, constitute a loss which,

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so far as it results from time and nature, falls upon the landlord. But the tenant is to take care that the premises do not suffer more than the operation of time and nature would effect; he is bound by seasonable applications of labour to keep the house as nearly as possible in the same condition as when it was demised."

This is not accepted by the Court of Appeal as being entirely accurate. Cozens-Hardy, M.R., says ([1911] 1 K.B. at pp. 912, 913, 914): "If he only meant to say that, given an old house which in the course of time, though still a habitable house, is rendered worse by mere lapse of time and the effects of wind and weather, the loss falls on the landlord, I should not object to the statement; but if it is to be made use of . . . as meaning that the tenant is not liable for anything which can be said to be due to the lapse of time and the elements, I respectfully do not assent to it. . . . If a tenant under a repairing lease finds that a floor has become so rotten that it cannot be patched up, that it is in such a condition that it cannot bear the weight of human beings or of furniture upon it, can it be said that the tenant is exempt from the liability of replacing that floor?"

As put by Buckley, L.J., in the same case (p. 926): "All the cases, to my mind, come only to this, that the question is one of degree." And the degree of repair which is described in this lease as "the best condition" must be taken in relation of the kind of house that was demised and the condition of repair in which it was at the time of the demise, which is also described by the same phrase.

The plaintiffs in this case put forward a grossly exaggerated claim; and the defendant, on his part, was equally blameworthy for his lack of any honest attempt to fulfil his obligation.

At the hearing we increased by \$6 the amount allowed, so as to correct what was apparently an error in computation in the amount allowed by the learned Judge for double value during the overholding. We also increased it by \$10, to cover the time lost by the landlord during the making of repairs. Justice would, we think, now be done by allowing a further sum of \$25



to cover the loss attributable to wear and tear, and not included by the learned Judge in his assessment.

With this variation, the appeal will be dismissed; and, as success has been divided, without costs.

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[DIVISIONAL COURT.]

MORAN V. BURROUGHS.

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*Negligence—Parent Permitting Infant to Use Fire-arm—Injury to Play-mate—Findings of Jury—Contributory Negligence of Infant Plaintiff—Application of Doctrine to Children.*

May 4.  
Dec. 28.

The infant plaintiff, a boy of twelve, was accidentally injured by a shot from a gun fired by the defendant's son, also twelve years old. In an action for damages for the injuries sustained, the jury found the defendant guilty of negligence in not having the gun, which had been lent to his son, removed from his house when he noticed it there, and that the injury to the infant plaintiff was occasioned by that negligence; but that the infant plaintiff was guilty of contributory negligence in passing in front of the gun, instead of behind it:—

*Held*, upon the evidence, that the question of contributory negligence was properly left to the jury; that the infant plaintiff, having regard to his intelligence and knowledge of fire-arms, was capable of contributory negligence; and that, upon the jury's finding of contributory negligence, the action must be dismissed.

The doctrine of contributory negligence in relation to children discussed and the authorities reviewed.

Judgment of BRITTON, J., reversed.

Action by James Moran and by his son John Adam Moran for damages for injury to the latter, resulting, as it was alleged, from negligence on the part of the defendant in permitting his infant son, a boy of about twelve years of age, to have in his possession a rifle and ammunition therefor upon the streets of the town of Smith's Falls.

The action was tried before BRITTON, J., and a jury, at Perth.

*J. A. Hutcheson*, K.C., for the plaintiffs.

*H. A. Lavell*, for the defendant.

May 4. BRITTON, J.:—The plaintiff John Adam Moran is also an infant, of about the same age as the son of the defendant. While the son of the defendant was using the rifle to shoot at a

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mark, and permitting the infant plaintiff and other boys to shoot with the same rifle, the infant plaintiff, John Adam Moran, was shot, causing him to lose completely his left eye. I asked the jury to answer certain questions, which they did, finding negligence on the part of the defendant, which negligence occasioned the accident and injury to the infant plaintiff; and the jury assessed the damages at \$300.

I put the further questions: "Was the boy plaintiff guilty of contributory negligence—that is to say, could he, by the exercise of reasonable care, have avoided the accident—if he could, what was the negligence of the boy plaintiff which you find?" The jury answered that the infant plaintiff could, by the exercise of reasonable care, have avoided the accident—that he should have walked behind, instead of in front. That answer can only mean that the boy plaintiff, at the time the firing was going on, walked in front of the firing-line. There was no evidence that the gun was intentionally fired at the time of the accident. Upon the undisputed evidence, the gun was accidentally discharged when being held by the son of the defendant, and while a struggle was going on for the possession of the gun, between the son of the defendant and another boy—not the plaintiff.

If there was any evidence of contributory negligence which should have been submitted to the jury, the defendant is entitled to the benefit of the jury's finding. I am of opinion that there was no evidence that would disentitle the plaintiff to recover merely by reason of contributory negligence. The presumption should stand that this infant plaintiff is not responsible for negligence. To disentitle the infant plaintiff to recover, it would require to be shewn that the injury was occasioned altogether by his own so-called negligence.

The jury assessed the damages at \$300—quite too small an amount if the plaintiffs are entitled to recover at all. Upon the facts, any solicitor advising that there was liability would think the case a proper one for the High Court. It is a case in which, in the exercise of my discretion, I should give the plaintiffs costs on the High Court scale.

Judgment for the plaintiffs for \$300 damages, with costs and no set-off of costs.

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The defendant appealed from the judgment of BRITTON, J.

November 19. The appeal was heard by a Divisional Court composed of BOYD, C., LATCHFORD and KELLY, JJ.

*C. A. Moss*, for the defendant. There was conflicting evidence of contributory negligence upon which the jury passed. The learned trial Judge was wrong in holding that there was no evidence that would disentitle the plaintiffs to recover merely by reason of contributory negligence. The only point that might be open to question is, could a boy of twelve years be guilty of contributory negligence? and I submit that he assuredly could. It has been held in some cases that a child under six years cannot be guilty of contributory negligence. In the case of a child of from six to fourteen years, the liability would run in an ascending scale; and, after the latter age, the child's responsibility would be the same as that of an adult. On that point I refer to Beven on Negligence, Canadian ed., pp. 161 to 167, inclusive; *Lynch v. Nurdin* (1841), 1 Q.B. 29; 29 Cyc., pp. 538-541; Halsbury's Laws of England, vol. 21, p. 453; *Gardner v. Grace* (1858), 1 F. & F. 359; *Crocker v. Banks* (1888), 4 Times L.R. 324, a case on the other side of the line. On the question of the father's responsibility for his child's torts, see *Thibodeau v. Cheff* (1911), 24 O.L.R. 214, and *Sullivan v. Creed*, [1904] 2 Ir. R. 317. The act which caused damage was the act of a third person: *Dominion Natural Gas Co. v. Collins*, [1909] A.C. 640.

*J. A. Hutcheson*, K.C., for the plaintiff. There was no contributory negligence here. The act of the plaintiff in passing in front of the gun was the same as that of a person passing in front of a standing railway train. Therefore, there was nothing to go to the jury on the question of contributory negligence. The trial Judge can decide whether there is anything to go to the jury on this question, and he has done that here: *Morrow v. Canadian Pacific R.W. Co.* (1894), 21 A.R. 149, at p. 152; *London and Western Trusts Co. v. Lake Erie and Detroit River R.W. Co.* (1906), 12 O.L.R. 28, at pp. 31, 32. On the question of the jury's finding liability of the father, see *Thibodeau v.*

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*Cheff*, 24 O.L.R. 214, at p. 221; Beven on Negligence, 2nd ed., pp. 157, 172; *Radley v. London and North Western R.W. Co.* (1876), 1 App. Cas. 754, at p. 759; *Tuff v. Warman* (1858), 5 C.B.N.S. 573, at p. 585; *Clark v. Chambers* (1878), 3 Q.B.D. 327, at p. 339; *Sangster v. T. Eaton Co. Limited* (1894), 25 O.R. 78, 21 A.R. 624; *T. Eaton Co. v. Sangster* (1895), 24 S.C.R. 708; *Merritt v. Hepenstal* (1895), 25 S.C.R. 150. Not much has been said about what bearing the Criminal Code may have on the case; but on that point see *Fowell v. Grafton* (1910), 22 O.L.R. 550, and *Dixon v. Bell* (1816), 5 M. & S. 198, therein referred to.

*Moss*, in reply. I am content with the law as laid down in *Thibodeau v. Cheff*. There could be no ultimate negligence. The evidence of contributory negligence could not be taken from the jury, and their finding was warranted.

December 28. BOYD, C.:—Difficult questions of law appear to be involved in the consideration of the legal liability of the defendant on the finding of the jury in response to questions. The sole ground as given by them is, that the father was negligent “in not having the rifle removed the first time he noticed it in the house.”

It appears to me, however, that, having regard to the question of contributory negligence on the part of the plaintiff, the infant injured, the appeal may be disposed of on that ground alone. The jury find that the boy was guilty of such negligence because he did not exercise reasonable care, in that he went across in front of the gun instead of behind. The Judge, as reported, left this to them on a conflict of evidence; but, afterwards, he vacated the finding, on the ground that there was no such conflict, on the evidence, as justified him in taking the opinion of the jury. He finally found that there was no evidence on the point to be considered by the jury, and he held that the boy exercised reasonable care, or was not guilty of any negligence.

He interprets the answer of the jury to mean that the boy, at the time the firing was going on, walked in front of the firing-line. He says that there is no evidence that the gun was intentionally fired at the time of the accident. It was, on undisputed evidence, accidentally discharged when being held by the



son of the plaintiff, and while a struggle was going on for the possession of the gun between the son and another boy, Morris McComb.

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The presumption, he says, should stand that the infant plaintiff is not responsible for negligence; and that, to disentitle the infant to recover, it must be shewn that the injury was occasioned altogether by his so-called negligence.

The conflict on these points is this:—

The injured boy gives this account (in chief): “He (the defendant’s son, Burroughs) went to shoot, and Morris says, ‘Give me a shot,’ and he said, ‘I will give you the next shot;’ and they were wrangling about it, and I went to go in behind, and some one said, ‘Look out,’ and I tried to stop as well as I could, and I was about half ways down when the charge hit me.”

On cross-examination, he says: “I was standing behind Burroughs when he came to shoot to the left side as he would be shooting. I did not start to cross till Morris got hold of the gun, and then I thought it was all right to cross. Brown shouted for me to come across and see his hockey stick; he was on the right side of Burroughs, and was between Burroughs and the puck (the mark shot at); I had to cross between Burroughs and the puck to get to him. I ran between the gun and the puck: I just got about between when the gun went off. I did not know it was dangerous to go there; the gun was off the other way. If the gun was pointed that way, it would be dangerous. Morris is bigger, and I thought he would have control of the gun, and it was pointed the other way. I thought I would have lots of time; when I started to run, it was not pointed at the puck—because Morris had moved it away. When I looked around, it was pointed toward me as I ran across; I dug down, and, instead of getting it in the side, I got it in the face.”

On re-examination, he said: “Morris turned it round; I was at the left side of Burroughs, three feet behind, before the gun was pushed round.”

This account given by the infant plaintiff does not accord with the position of the gun given by the other witnesses; in fact

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his account stands alone and is not corroborated. It is not in agreement with the version given by his own witness McComb.

Morris McComb, who was aged sixteen, and the oldest boy there, is called for the plaintiff, and says: "While Burroughs and I had hold of the gun, the plaintiff, who was off at the left side, ran across in front of it for some reason, and it went off and hit him. When I took hold of the gun, it was pointing right for the puck; the muzzle was a little bit lower than when we were shooting at the puck. When I got hold of the butt and caught hold of his hand, the direction of the barrel was not changed; it was still towards the puck."

On cross-examination: "I warned them all to stand back; to keep away from the puck. The plaintiff was out of harm's way when I first took hold of the rifle; I was facing the direction the plaintiff was coming from. It did not go off as soon as we got hold, but almost immediately afterwards. The direction of the barrel was not very much changed when I caught hold; it was still straight towards the puck."

The defendant's son (who was twelve and just about the same age as the infant plaintiff) says that he did not see the plaintiff till after he was shot. He says he had the gun ready to shoot and turned round to say something to McComb, "when he ran up and grabbed the gun, which went off as soon as he got beside me. I was not taking aim when he grabbed me. There was no scuffle. He did not pull the gun towards himself, and I did not pull it away; I suppose shoving the gun up against him it went off."

The account by the only other witness, Clarence Palmer, called for the defendant, is as follows: "When Burroughs got the gun, the plaintiff was at one side. He, the plaintiff, asked for a cartridge, and Brown (another boy referred to by the plaintiff) said he would give him one, and he started over to get it. I was watching Moran (plaintiff). The rifle was pointing at the puck. Burroughs put in shot and pulled back the hammer and held the rifle about waist high. . . . McComb stepped up and took hold of barrel with right hand and stock with left—gun was still down by the waist, and I did not expect it to go off immediately McComb touched it."

The conflict of evidence thus appearing, which would be proper for the jury to consider, is as to the position of the gun. The infant plaintiff is very emphatic and repeats again and again that the gun was pointed the other way, *i.e.*, not in the direction of the puck, when he started across. The evidence of all the other witnesses present is contrary to this; they say that the gun was always pointed towards the puck; and the infant plaintiff himself admits that if the gun was pointed that way it would be dangerous to cross in front of it. The jury have in effect found that it was dangerous to cross in front of the pointed gun, and that the infant should have gone round behind—as he at first says he did.

A careful reading of the evidence leads me to conclude that the Judge rightly left it to the jury.

I may further note that the learned Judge seems to have thought that there was some presumption which could be brought into the scales in dealing with contributory negligence on the part of the infant. This boy was over twelve, had been several years at school, was bright and intelligent, according to the witnesses, and as would appear from internal evidence in reading his testimony, and he was also not unfamiliar with guns and shooting (which seems to be rather a common means of enjoyment among the juvenile population of Smith's Falls).

In *Sangster v. T. Eaton Co. Limited*, 25 O.R. 78, the head-note gives: "*Semble*, that the doctrine of contributory negligence is not applicable to a child of tender years." That is founded on *Gardner v. Grace*, 1 F. & F. 359, which is cited for the same purpose in *Simpson on Infants*, p. 98, 3rd ed. (1909). In the Ontario case, the child was two and a half years old; and, in the English case, the age was three and a quarter years. In that case Channell, B., used much the same expressions as those quoted from the judgment of Britton, J. Age is the most important factor in the application of this rule. Want of ordinary care which might not disentitle a child of tender years to recover would so operate in the case of an older child. The point is neatly put in *Eversley*: "The question is really whether an infant of tender years can be said, by reason of his want of experience and an incapacity to judge rightly of the probable result of his acts,

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to be guilty of negligence:" Domestic Relations, p. 831, 3rd ed. (1906). As summed up in the latest book of repute, Halsbury's Laws of England, vol. 21, p. 453, we find: "Where a child is of such an age as to be naturally ignorant of danger or to be unable to fend for itself at all, he cannot be said to be guilty of contributory negligence in regard to a matter beyond his appreciation; but quite young children are held responsible for not exercising that standard of care which may reasonably be expected of them:" (1912), tit. "Negligence."

The law as to infants on this head is well stated by Lord Low in *Cass v. Edinburgh and District Tramways Co.*, [1909] Sess. Cas. 1068, 1076. The law is also discussed, and the same conclusions reached by Field, J., in *Collins v. South Boston R.R. Co.* (1886), 142 Mass. 301.

As to children over the age of criminal responsibility (seven years, see Criminal Code, sec. 17), and perhaps even younger, the alternatives for the jury would seem to be well expressed in a New York case: "If you say that the child did what an ordinarily careful child would have done, then it is not negligence." On the other hand, if the boy failed to adopt the means known to him to be effective in protecting against danger, and was injured thereby, then he cannot recover: *Moebus v. Herrmann* (1888), 108 N.Y. 349.

These citations of law shew that, on the facts of this case, the boy was capable of contributory negligence, and the jury, have found that he was guilty thereof.

Upon the answers to the questions, the action should stand dismissed, and the judgment in appeal should be set aside, and there should be judgment for the defendant. But it is not a case for costs; the jury have found the defendant guilty of negligence in not removing the gun from the reach of the boy or sending it home.

LATCHFORD, J.:—I agree.

KELLY, J.:—This is an action for damages brought by a boy, John Adam Moran, who, on the 10th April, 1912, attained thirteen years of age, and by his father, James Moran, for damages



for injuries to the boy by a shot from a gun in the hands of the defendant's son, twelve years of age.

The defendant's son had borrowed the gun from a neighbour boy, and kept it in his father's premises for some time, his parents both having become aware of its being there.

On the day on which the shooting took place, the 1st December, 1911, he took the gun from the house and met some other boys in a field, and the infant plaintiff joined this party.

The boys were engaged shooting at a mark, taking turns in the shooting, and, after the infant plaintiff had shot, he was standing close by the defendant's son, who had obtained possession of the gun, and, while it was in his hands, one of the other boys also took hold of it, evidently with the intention of getting possession of it, and, according to the evidence of the plaintiff John Adam Moran, these boys were "wrangling about it."

The infant plaintiff, at that time, ran from left to right across the line on which the shooting was taking place, that is, the line from the gun to the target; and, while he was doing so, the gun was discharged, the shot striking him in his right cheek and passing out through his left eye, with the result that the eye had to be removed.

The jury, in answer to questions submitted to them, found the defendant guilty of negligence in not having the gun which had been lent to his boy removed from the house when he noticed it there, and that the accident to the infant plaintiff was occasioned by that negligence.

The jury also found that the infant plaintiff was guilty of contributory negligence in passing in front of the gun, instead of behind it.

The learned trial Judge in his judgment stated it as his opinion that there was no evidence that would disentitle the plaintiff to recover merely by reason of contributory negligence, and declared that the presumption should stand that the infant plaintiff was not responsible for negligence.

On the question of contributory negligence, I am of opinion that there was evidence which could properly be submitted to the jury, unless as a matter of law the infant plaintiff could not, by reason of circumstances, such as his age or want of appreciation of danger, be found guilty of contributory negligence.

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In Halsbury's Laws of England, vol. 21, p. 453, it is laid down that "a distinction must be drawn between children and adults, for an act which would constitute contributory negligence on the part of an adult may fail to do so in the case of a child or young person, the reason being that the same standard of care cannot be expected from a child as from an adult. Where a child is of such an age as to be naturally ignorant of danger or to be unable to fend for itself at all, he cannot be said to be guilty of contributory negligence in regard to a matter beyond his appreciation; but quite young children are held responsible for not exercising that standard of care which may reasonably be expected of them."

And in Mayne on Damages, 7th ed., p. 75, it is said: "It is now settled that the doctrine of contributory negligence applies to infant plaintiffs. Nevertheless, the same degree of care is not to be expected from children as from adults."

Taking this as the distinction to be made, in respect of negligence on the part of infants, can it be said that the infant plaintiff was of such an age as to be naturally ignorant of danger generally, or that he had not an appreciation of the danger he would incur in passing between the gun and the target at the time when shooting was going on and the gun was in preparation for another shot by one of his companions?

It is in evidence that he is a bright, intelligent boy, who had been attending school for about four years, that he had on other occasions shot with guns, and that he had such knowledge of them as taught him their danger; and, according to his own statement, he knew that it was dangerous to pass between the gun and the target.

My view is, that he had full knowledge and appreciation of the danger, to such an extent, at least, as undoubtedly put him out of the class of infants who cannot be found guilty of contributory negligence.

I think, on the findings of the jury, the action should have been dismissed; and I, therefore, would allow the appeal. In view of the defendant having also been found guilty of negligence, there should be no costs.

*Appeal allowed.*

[IN CHAMBERS.]

RE CANADIAN OIL COMPANIES V. MCCONNELL.

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Dec. 30.

*Division Courts—Want of Territorial Jurisdiction—Motion for Prohibition—Applicant's Default and Delay—Failure to Explain—Absence of Prejudice—Discretion—Refusal of Motion—Costs.*

An action for the price of goods sold and delivered was brought in a Division Court which had no territorial jurisdiction. The defendant filed a notice disputing the jurisdiction; but did not attend at the trial; and judgment was given for the plaintiff. The defendant moved in the Division Court for a new trial; his application was dismissed because it was made too late. He then moved for prohibition; but, in his affidavit in support of the application, did not explain or excuse his default and delay, and did not disclose the nature of his defence, merely saying that he had a good defence upon the merits:—

*Held*, that prohibition should not be granted.

Where a defendant does not attend at the trial of an action for the purpose of upholding his contentions, and where it is not made clearly to appear that any injustice will be done by allowing the judgment to stand, prohibition should not be granted.

*Mayor, etc., of London v. Cox* (1867), L.R. 2 H.L. 239, 283, followed.

The practice of suing in a Division Court which is known to have no jurisdiction, is not one that should be encouraged; and the motion for prohibition was dismissed without costs.

MOTION by the defendant in an action in the First Division Court in the County of York for a prohibition, upon the ground of the absence of territorial jurisdiction.

December 20. The motion was heard by MIDDLETON, J., in Chambers.

*W. E. Raney*, K.C., for the defendant.

*D. Inglis Grant*, for the plaintiffs.

December 30. MIDDLETON, J.:—The action is for \$44.30, the price of goods sold and delivered. The defendant resides at Proton, in the county of Grey. The writ of summons was served on the 6th August, 1912. A notice disputing the jurisdiction of the Court was immediately filed. On the 10th of September, the day named in the summons, the action came on for trial in the Division Court. The defendant was not present nor was he represented in any way; and judgment was given for the plaintiff.

An application was made in the Division Court for a new trial, which application was dismissed, probably because it was out of time.

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This motion is now made; and the defendant's affidavit, stating that the contract for the purchase of the goods referred to was made in his store at Proton, and not elsewhere, is not contradicted; so that it may be assumed that the York Division Court had no territorial jurisdiction.

The plaintiffs base their opposition to the granting of the order upon the discretion of the Court to refuse to prohibit.

Willes, J., in *Mayor, etc., of London v. Cox* (1867), L.R. 2 H.L. 239, 283, says: "Where . . . the defect is not apparent and depends upon some fact in the knowledge of the applicant which he had an opportunity of bringing forward in the Court below, and he has thought proper, without excuse, to allow that Court to proceed to judgment, without setting up the objection, and without moving for a prohibition in the first instance, although it should seem that the jurisdiction to grant a prohibition . . . is not taken away, for mere acquiescence does not give jurisdiction . . . yet, considering the conduct of the applicant, the importance of making an end of litigation, and that the writ, though of right, is not of course, the Court would decline to interpose, except perhaps upon an irresistible case, and an excuse for the delay, such as disability, malpractice, or matter newly come to the knowledge of the applicant."

This statement of the law was adopted by the full Court of Appeal in *Broad v. Perkins* (1888), 21 Q.B.D. 533.

The question, therefore, in this case, is, whether the defendant has shewn anything which amounts to an excuse for his delay. In the affidavit upon this motion no attempt is made either to explain or excuse the delay. In the affidavit made in the Division Court, all that is said is, that the defendant did not attend the trial, "believing that the case would be transferred to the proper Division Court."

There is no satisfactory affidavit of merits. The defendant does not condescend to disclose his defence, if he has one. He contents himself with saying: "I have, as I am advised and verily believe, a good defence to this action upon the merits."

I think the cases warrant me in holding that, where a defendant does not attend at the trial of an action for the purpose of upholding his contentions, and where it is not made



clearly to appear that any injustice will be done by allowing the judgment to stand, the Court ought not to grant a prohibition; for the reason so well indicated in the extract quoted. Here, not only has there been a failure to attend, but the defendant has applied in the Division Court to set aside the judgment. It is true that this application was abortive by reason of the delay in making it; but no case of hardship is shewn, as, for all that appears, the debt is justly owing.

I dismiss the motion without costs, as I do not think the practice of suing in a Division Court which is known to have no jurisdiction, is one that ought to be encouraged.

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MORRISON V. PERE MARQUETTE R.R. Co.

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Dec. 30.

*Railway—Breach of Statutory Duty—Neglect to Furnish Accommodation for Passengers at Station—Dominion Railway Act, secs. 284(1) (a), (7), 427 (2)—Exposure of Passenger to Cold—Damages—Remoteness—Finding of Jury—Board of Railway Commissioners—7 & 8 Edw. VII. ch. 60, sec. 10.*

Where a wrongful act has occasioned exposure to the weather, and illness has resulted from such exposure, such illness is not to be regarded as due to an intervening independent cause.

The rule with regard to remoteness of damage is the same whether the damages are claimed in an action of contract or of tort. The inquiry is, what is the natural and probable consequence of the breach?

*Hobbs v. London and South Western R.W. Co.* (1875), L.R. 10 Q.B. 111, distinguished.

*McMahon v. Field* (1881), 7 Q.B.D. 591, and *The Notting Hill* (1884), 9 P.D. 105, specially referred to.

And held, in this case, affirming the judgment of BRITTON, J., ante 271, that the plaintiff was entitled to recover for his loss of health occasioned by the defendants' default and neglect and breach of statutory obligation; and that the jury had rightly measured the full amount of his damage: secs. 284 (1) (a), (7), and 427 (2), of the Railway Act, R.S.C. 1906, ch. 37.

The amendment to the Railway Act, by 7 & 8 Edw. VII. ch. 60, sec. 10, shews that, even if the Board of Railway Commissioners had a right to interfere, the action of the person aggrieved was not taken away.

APPEAL by the defendants from the judgment of BRITTON, J., 27 O.L.R. 271.

December 18. The appeal was heard by a Divisional Court composed of BOYD, C., LATCHFORD and MIDDLETON, JJ.

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*D. L. McCarthy*, K.C., and *E. A. Cleary*, for the defendants, argued that the jury's verdict was against the weight of evidence, and that the damages were too remote. The damages were not such as could have been fairly in the contemplation of the parties as likely to result. They referred to *Hobbs v. London and South Western R.W. Co.* (1875), L.R. 10 Q.B. 111; *Hadley v. Baxendale* (1854), 9 Ex. 341; *Hamlin v. Great Northern R.W. Co.* (1856), 26 L.J. Ex. 20; *McMahon v. Field* (1881), 7 Q.B.D. 591; *Toronto R.W. Co. v. Grinsted* (1895), 24 S.C.R. 570; *Grand Trunk R.W. Co. v. Department of Agriculture of Province of Ontario* (1909), 42 S.C.R. 557. Besides, the matter of erection of stations was now placed in the hands of the Board of Railway Commissioners by sec. 258 of the Railway Act, R.S.C. 1906, ch. 37; reference to Jacobs on the Railway Law of Canada, p. 392, dealing with this section.

*J. H. Rodd*, for the plaintiff, contended that the judgment appealed from was right, for the reasons given by the learned trial Judge. This was not a case of breach of contract, but of breach of a statutory duty; many of the authorities cited for the defendants did not apply. As to the contention that the cold was too remote to be attributable to the negligence of the defendants, the verdict of the jury settled that. Under sec. 284 of the Railway Act, the defendants were clearly liable, in the circumstances.

*McCarthy*, in reply.

December 30. The judgment of the Court was delivered by BOYD, C.:—In cases of contract the Judges in *Hobbs v. London and South Western R.W. Co.*, L.R. 10 Q.B. 111, 117, sought to lay down a general principle or rule whereby the damages might be measured in the event of the contract being broken, and the nearest approach to certainty made by them still leaves the matter very much at large in particular instances.

The rule formulated in the *Hobbs* case was reconsidered and modified in *McMahon v. Field*, 7 Q.B.D. 591, 597, and is thus summarised by Cotton, L.J.: "It is said that the rule is that the damages to be recoverable should be such as would be fairly in the contemplation of the parties at the time the contract was

made as the probable result of a breach of it; but in my opinion the parties never contemplate a breach, and the rule should rather be that the damage recoverable is such as is the natural and probable result of the breach of contract."

The result of this modified principle is seen in the difference of view taken upon the question decided in the *Hobbs* case and the review of it in the later case. The breach of contract was, taking the passenger to a wrong destination by reason of which the passenger had to walk home at midnight in a drizzle of rain, caught cold and was laid up with sickness. In the earlier case Cockburn, C.J., thought that this catching cold might be called the effect of the breach in a certain sense, but it was not the immediate consequence; it was not the primary but the secondary consequence (p. 118); whereas in the later case, Bramwell, L.J., said [so far from the cold caught by the passenger being a secondary consequence of the breach of contract and too remote]: "I do not see why a passenger who, by the default of the railway company, was obliged to walk home in the dark might not recover in respect of such damage, it being an event which might not unreasonably be expected to occur" (p. 594); and Brett, L.J., said that what happened was the natural consequence of the breach and not too remote (p. 596).

In *Toronto R.W. Co. v. Grinsted*, 24 S.C.R. 570, the cause of action was not in contract, but for wrongfully putting off the plaintiff from a street car, in consequence of which he caught cold and became ill. There had been some altercation between the conductor and the passenger, in which the latter had become heated and was thrown into a profuse perspiration. In this state he was ejected from the car, and his bodily condition thus occasioned predisposed him to suffer from the cold, and on this ground the railway company were held liable in damages.

This case is not in point in the present litigation, where the damage arose from a breach of statutory duty on the part of the railway company. It was not seriously disputed that my brother Britton was right in holding that there was such a breach.

Marshfield had been "a stopping-place established for such purpose," within the meaning of the Railway Act, R.S.C. 1906,

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ch. 37, sec. 284, sub-sec. 1 (a), and for two years the defendants had neglected to furnish an adequate and suitable shelter for the accommodation of passenger traffic at that point. A former station-house at that place had been burned down, and there was nothing put up to replace it, and the stopping-place was absolutely unsheltered for two years. The company must have, therefore, been prepared to take all risks of accident and damage resulting from their passengers being exposed to climatic changes of temperature at the point.

The passenger had a return ticket by the evening train which stopped at Marshfield; he was there on time; and had to wait for some time in the chill atmosphere—long enough and cold enough, in the opinion of the jury, to occasion the sickness which came upon him almost forthwith. The plaintiff was shut up to the situation created by the default of the railway; he had no means of finding out how late the train was, or when it might be expected; for fear of losing it, he had to walk about on the platform awaiting its arrival.

These circumstances were all for the jury, and it was for them to consider whether the damages claimed were reasonable under the direction of the Judge: *Hammond & Co. v. Bussey* (1887), 20 Q.B.D. 79, at pp. 89, 90. The statute gives, by sec. 284(7), an action to any person aggrieved by the neglect of the company to comply with the requirements of the section, and the company shall not be exempt by any notice, declaration or condition, if the damage has arisen from the negligence or omission of the company. In this case there was a deliberate act, and a continuous act of neglect for two years, in violation of the statute, and it is to be assumed that the company had in contemplation all the likely and natural consequences which might arise to passengers exposed at that station to all conditions and changes of weather.

And, by sec. 427(2) of the Act, the company are made liable, in case of such omission of duty, to any person injured thereby, for the full amount of damages sustained thereby.

The question was raised whether or not this matter lay in the hands of the Board of Railway Commissioners. The amendment to the Act by 7 & 8 Edw. VII. ch. 60, sec. 10, shews that,



even if they had a right to interfere, the action of the person aggrieved is not taken away—though the result of that action sounding in damages may be modified by their active interference.

The proper measures of damages in cases of breach of contract and tort in many respects coincide. The distinction between this case and the *Hobbs* case does not to me appear to reside so much in the nature of the cause of action as in the proper answer to the inquiry, what is the natural and probable consequence of the breach? It has been said that the rule with regard to remoteness of damage is precisely the same whether the damages are claimed in actions of contract or of tort: Brett, M.R., in *The Notting Hill* (1884), 9 P.D. 105, 113.

Applying this test, the plaintiff is entitled to recover for his loss of health occasioned by the company's default and neglect, and breach of statutory obligation. The jury has rightly measured the "full amount" of his damage: see *Addis v. Gramophone Co.*, [1909] A.C. 488, at p. 498.

I am prepared to adopt as correct the text of Lord Halsbury's book on this branch of the law, *Laws of England*, vol. 10, p. 321, sec. 589: "Where a wrongful act has occasioned exposure to the weather and illness has resulted from such exposure, it seems that such illness is not to be regarded as due to an intervening independent cause."

The judgment should be affirmed with costs.

[The defendants appealed from the above judgment to the Appellate Division of the Supreme Court of Ontario. On the 3rd March, 1913, the appeal was heard and dismissed. The judgment of the Appellate Division will be reported in due course.]

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## [DIVISIONAL COURT.]

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WOOD v. GRAND VALLEY R.W. Co.

Dec. 30.

*Contract—Subscription for Bonds of Railway Company—Undertaking to Construct Branch Line—Signature to Agreement—Liability of Company—Personal Liability of President—Money Paid on Faith of Undertaking—Non-performance—Damages—Remoteness—Assessment—Variation on Appeal—Nominal Damages.*

*Held*, affirming the judgment of the trial Judge, MIDDLETON, J., 26 O.L.R. 441, that the defendant P., the president of the defendant company, as well as the company, was bound by the undertaking to provide railway connection contained in the document signed by him for the company, and was personally liable for its breach.

*Held*, also, that the proximate consequence of the breach of the undertaking was within the contemplation of the parties—a loss of benefits in the transaction of business in the village in which the plaintiffs resided or did business; and the damages arising from that loss were not too remote nor indirect.

*Chaplin v. Hicks*, [1911] 2 K.B. 786, specially referred to.

*Held*, also, that there should be a variation in the trial Judge's assessment of the damages sustained by the several plaintiffs, those who were not directly interested as manufacturers being allowed only nominal damages.

APPEAL by the defendants from the judgment of MIDDLETON, J., 26 O.L.R. 441.

November 18. The appeal was heard by a Divisional Court composed of BOYD, C., LATCHFORD and KELLY, JJ.

*C. J. Holman*, K.C., and *T. H. Peine*, for the defendant Pattison, argued that Pattison did not sign the memorandum individually, but merely as president of the railway company, and he should, therefore not be held liable personally. The plaintiffs should be confined to the four corners of the agreement: *Inglis v. Buttery* (1878), 3 App. Cas. 552, at p. 572. As to the damages, substantial damages should not be awarded where they are uncertain, as in this case. The true rule was laid down by Mr. Justice Burton in *Corbet v. Johnson* (1884), 10 A.R. 564, at p. 575, as follows: "2. The damages must be certain both in their nature and in respect to the cause from which they proceed." This rule was adopted in *Pullan v. Jones* (1911), 3 O.W.N. 361. On the same subject he referred to Am. and Eng. Encyc. of Law, 2nd ed., vol. 8, p. 614; *Taylor v. Bradley* (1868), 4 Abb. App. Dec. (N.Y.) 363; *Simpson v. London and North Western R.W. Co.* (1876), 1 Q.B.D. 274; *Corporation of Whitby*

v. *Grand Trunk R.W. Co.* (1901-2), 1 O.L.R. 480, 3 O.L.R. 536; *Dullea v. Taylor* (1874), 35 U.C.R. 395; *Adams Express Co. v. Egbert* (1860), 36 Pa. St. 360; Mayne on Damages, 8th ed., pp. 13, 70; *Western Union Telegraph Co. v. Crall* (1888), 39 Kan. 580; *Sapwell v. Bass*, [1910] 2 K.B. 486; *Fitzsimmons v. Chapman* (1877), 37 Mich. 139. The damages here were not the certain result of the breach. As to the case of *Chaplin v. Hicks*, [1911] 2 K.B. 786, referred to by the learned trial Judge, it was not like this case; but *Sapwell v. Bass* (*supra*), referred to there, was a similar case to the present.

*S. C. Smoke*, K.C., for the defendant railway company, on the question of damages, contended that the case of *Chaplin v. Hicks* was so different that it could form no basis for the judgment here.

*G. F. Shepley*, K.C., and *J. Harley*, K.C., for the plaintiff, said they would not trouble the Court further with the cases. The damages were estimated by the trial Judge sitting as a jury, and regarding all the contingencies; and the substantial sum at which he arrived should not be questioned by a Court of review. If Pattison was not bound by the writing, he was bound by the original agreement made with the plaintiff, which did not require to be in writing. The agreement was, in fact, signed both by the company and by Pattison individually. By the letter of the 15th June, Pattison had recognised his personal responsibility.

*Holman*, in reply.

December 30. BOYD, C.:—Of all the defences upon the record, two only were brought before us on this appeal.

It was contended, first, that as to the defendant Pattison there was no personal liability; and, second, as to both defendants, that the plaintiff had no right to more than nominal damages, and that, therefore, the \$10 brought into Court was ample satisfaction, even if there had been a breach for which both defendants were liable.

The judgment in appeal is to be upheld on both heads, though it should be reduced in extent, and though the lines of support may be somewhat different from those of my brother Middleton.

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The action is based on an agreement made on the 29th June, 1906, set out in the pleadings. By it, Mr. A. J. Pattison, president of the Grand Valley Railway Company, undertakes and agrees, on his own behalf and on behalf of the said Grand Valley Railway Company, that he will make or cause to be made a through traffic arrangement with the Canadian Pacific Railway Company by means of an extension of the Grand Valley Railway to St. George; this he undertakes in consideration of the purchase of bonds of the Grand Valley Railway Company by certain manufacturers and other citizens of St. George. These latter parties were then well-known, and they had in fact already made applications for bonds up to the extent of \$10,000, which was the amount stipulated for by Mr. Pattison in his negotiations which ended in the agreement. The applications were in escrow and not to be operative till a personal guarantee from the president of the Grand Valley Railway Company had been secured. These applications, according to date, were: one for \$2,000 of bonds, on the 6th June, 1906, on behalf of the Jackson Waggon Company; another of the same date, for \$2,000, signed by Dr. E. E. Kitchen; one on the 7th June for \$2,000, by the Bell Foundry Company; and one on the 15th June for \$4,000, signed by Dr. Kitchen, J. P. Laurason, S. G. Kitchen, F. K. Bell, and W. B. Wood. These make up \$10,000; but, by some adjustment not very clear on the evidence, there was a further application by W. B. Wood for \$2,000 on behalf of the Brant Milling Company.

The action is now brought by these plaintiffs, W. B. Wood, the Jackson Waggon Company, J. P. Laurason, S. G. Kitchen, E. E. Kitchen, W. B. Wood and A. J. Wood, the latter carrying on business as the Brant Milling Company. The three companies, all doing business at St. George and elsewhere, who took stock on the faith of the undertaking embodied in the agreement of the 29th June, were the Jackson Waggon Company, the Brant Milling Company, and the Bell Foundry Company. The latter became insolvent and were not able to meet the payments for the bonds, and were relieved by the others—but no transfer was taken of any rights under the agreement, although the bonds were, as I understand, delivered to some of the plaintiffs. The plaintiffs, individually named, W. B. Wood, S. G. Kitchen,



E. E. Kitchen, and J. P. Laurason, were more or less interested in the said companies, but they individually held some of the bonds.

The relative interest of the parties is somewhat cleared up by the delivery of particulars pursuant to an order made for that purpose. By these, all the individual plaintiffs claim no more than nominal damages, but substantial damages are claimed by the Jackson Waggon Company to the extent of \$5,000 and by the Brant Milling Company to the extent of \$8,000. The order of the 13th November for these particulars provided that all evidence should be barred as to other damages. The particulars furnished should have been added to and made a part of the record. Perhaps by reason of the omission so to make them, the effect of that order and the response thereto by the individual plaintiffs has been overlooked in the judgment.

What the St. George people desired was to have freight connection by means of the Grand Valley Railway with the Canadian Pacific Railway at Galt, and all the profits expected to result appealed to the business men and the manufacturers by reason of competitive rates and easier methods of carriage and shipment of goods. The appeal was specially and substantially to the manufacturers who are the plaintiffs, and not to the individual plaintiffs, who could not expect any tangible benefits except those which would be common to the whole community. Wood lives at Montreal, Laurason at Toronto, the two Kitchens at St. George—one a retired farmer and the other a physician. Therefore, the failure to construct the road may not have sounded in damages as to them in any way commensurable in a Court; and so their claim for nominal damages merely is not improvident.

Hence, as it seems to me, the inquiry should be as to what damages have been sustained by the two plaintiff companies, each holding \$2,000 in bonds of the defendants. Both parties agreed to the damages being disposed of by the Judge upon the evidence as taken at the trial.

The agreement contemplated a speedy completion of the work. Laurason gives the language of Mr. Pattison, saying that he would bring the road into St. George before the snow flies if they bought the bonds.

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The first and immediate thing to be done was to extend the railway to St. George, and then to make a through traffic arrangement with the Canadian Pacific Railway Company at Galt, the Grand Valley Railway Company supplying the necessary sidings and switches. The failure to construct this intermediate piece of the road was the breach of the contract, and involved the loss of all the expected advantages. For this connection the plaintiffs were willing to buy and pay for the bonds, and these were regarded as merely a collateral security for the performance of the undertaking. The very construction of a road operative up to St. George would have brought advantages to the merchants and manufacturers. This feature of the bargain was in the minds of both parties, and is the benefit referred to in the writing of the 6th June as being the establishment of freight connection with the Canadian Pacific Railway at Galt (words used by the defendant Pattison). The proximate consequence of the breach complained of was within the contemplation of the parties—a loss of benefits in the transaction of business at St. George.

I do not feel pressed by any difficulty raised on the ground of remoteness of damage; nor is there any on the ground of directness. To use the words of Cleasby, B., in *Candy v. Midland R.W. Co.* (1878), 38 L.T.R. 226, 227; “Where there is the common knowledge of a particular object, then damages may be recovered for the natural consequences of the failure of that object.” It does not become the defendant, who has broken the contract, to say that, had he done the preliminary work of extending the line, there might have been all sorts of difficulties and contingencies in carrying out and completing the work subsequently to be done. That is all besides the question as to whether there was an actionable wrong and a right to recover actual damages resulting from the failure of the defendant to do his part. The language used in *Simpson v. London and North Western R.W. Co.* (1876), 1 Q.B.D. 274, 277, seems appropriate here, *i.e.*: it is to be assumed that the plaintiff would get some benefit; and, though there may be some speculation as to the amount, it is not impossible to award more than nominal damages. Had the defendant done his part, it is to be assumed that all the rest would have followed in due course, but yet the ap-

praisal of damages is not to be made nor can it be made absolutely and certainly, but, as said by Mathew, J., in *Faulkner v. Cooper & Co. Limited* (1899), 4 Com. Cas. 213, 215, the tribunal "must take into account the chances of human life, the vicissitudes of trade, the probability of the plaintiff's customers ceasing to deal with the defendant company, and various other considerations"—many of which are set out by Mr. Holman in his reasons of appeal.

It may be that the English Courts have taken a distinct step in advance in the case relied on by the Judge of trial, *Chaplin v. Hicks*, [1911] 2 K.B. 786; but it marks only a point in the evolution of the law relating to damages. In a commercial country, the obligations of contracts are strenuously enforced, and a man is not to be allowed to escape the penal consequences of a broken contract by saying that the damages are too remote. Against this the Courts are setting themselves; and this latest decision has been commended by the law magazines as a neat illustration of the difference between the mere violation of a legal right without measurable damages and a breach which, though the result be contingent and speculative, is enough to be left to the appreciation of a jury. The intervention of a third person's judgment or discretion makes no difference in principle: 27 *Law Quarterly Review*, p. 383. The doctrine laid down in the case is spoken of as a valuable guide in 37 *Law Magazine*, pp. 223, 224.

Each company paid \$1,940 for the \$2,000 bonds. This affords some approximation of the amount of damages sustained, as representing the amount practically lost by relying on the word of Pattison. I would not discard the method of getting at figures adopted by my brother Middleton, but I would reduce the damages to both the company plaintiffs to the sum of \$3,880; giving to the other plaintiffs the \$10 paid into Court, as nominal damages.

It remains to place the liability of Pattison as it appears to me on the evidence. When the paper of the 6th June was proffered to the plaintiffs, it was refused on the ground that it did not provide for personal liability. That paper was written out and signed by Pattison thus: "The Grand Valley Ry., Prest."

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The agreement sued on was prepared by Wood to provide for the omitted factor of personal liability on the part of the president, as the plaintiffs found out that he was a person of financial responsibility, and they regarded the railway as of little worth as a security. This was drawn providing for the purchase of the bonds on the terms of Mr. A. J. Pattison, president of the Grand Valley Railway Company, agreeing "on his own behalf" to make or cause to be made the through traffic arrangement which involved the extension of the road at once; and, at the end, the terms of the agreement were to be binding upon the heirs, executors, and assigns of Pattison. He signed this, as in the former paper: "The Grand Valley Ry. Co., Prest." And, before the "Prest.," signed his own name at length, "A. J. Pattison." I think that he thus gave the other parties to understand that he was signing not only as president but as an individual. A dual character was attached to the signature, from which he should not be allowed to recede because he now says he did not intend to bind himself; and that, if he had been going to bind himself, he would not have signed without more time for consideration. He had time for consideration: it was known from the outset that his own personal liability was a *sine qua non*; and I agree with the trial Judge as to his estimate of the evidence. No satisfactory explanation is given by Mr. Pattison of the words "on his own behalf," and the clause as to heirs and executors; and there is no other explanation except that referable to his becoming personally liable. The defendant asks for a reformation of the contract if, in its construction, he is found to be so personally implicated. If reformation were needed, it should rather be the other way, by declaring that the true bargain was that he should be bound, and so declaring if the writing is to be read as halting in this respect. But, I think, sufficient appears as it stands to uphold the plaintiffs' claim. Having taken the benefit of what was done, though it may be for the primary benefit of his company, he cannot avoid giving effect to all the terms, though as a formal thing he has not affixed an individual and independent signature to the writing, in addition to the words and names he has used in authentication and verification of it.



With the reduction of amount, the judgment should be affirmed with costs.

It may be a proper term of the judgment to direct the delivery up of the \$4,000 bonds held by the two companies as originally subscribed by them.

LATCHFORD, J.:—The writing subscribed “The Grand Valley Railway Company, A. J. Pattison, president,” did not cover all that was agreed upon between Mr. Pattison and certain of the plaintiffs before the document was signed. The trial Judge so finds, and there is evidence to warrant his finding. It was open to the plaintiffs, with whom the agreement was made, to shew—and they did shew—that the written instrument was not a complete record of what had in fact been agreed.

“It should be borne in mind that a written contract, not under seal, is not the contract itself, but only evidence—the record of the contract:” Bramwell, B., in *Wake v. Harrop* (1861), 6 H. & N. 768, at p. 774; affirmed, 1 H. & C. 202.

Here the record, though incomplete, is—as the trial Judge determined—conclusive that Pattison is personally bound. Pattison seeks to take advantage of the fact that he did not sign the writing otherwise than as president of the Grand Valley Railway Company. The company, acting through him and only through him, subscribes to a document declaring that he has undertaken and agreed “on his own behalf” to make certain traffic arrangements; that is, as several of the plaintiffs desired, he personally would make such arrangements. The evidence outside the document—apart from Pattison’s, which is not credited—is overwhelming that what such plaintiffs insisted on was the undertaking of Pattison himself, not only as to the rates to be charged by another railway but as to the all-important prerequisite—the construction of the link connecting the town of St. George with that railway.

The manufacturers of the town desired to have competition with the existing line for their inward and outward freight, because of the cheaper rates and consequently greater profits that such competition would insure. When Mr. Wood prepared the written agreement, he manifested an intention to bind Pattison

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to all that Pattison had promised in return for the \$10,000. Manifestly, the construction of the line had been promised; otherwise, traffic arrangements for direct connection with the Canadian Pacific Railway at Galt would be absolutely futile.

I think the writing itself—considered apart from the testimony at the trial—is evidence that Pattison contracted, “on his own behalf and on behalf of the Grand Valley Railway Company, to proceed at once with the extension of his railway to St. George.” Otherwise the proviso is meaningless that the terms, etc., of the agreement are to be “binding upon the heirs, executors, and assigns of the said Pattison.”

I do not regard as tenable the contention of Mr. Pattison that, as he did not sign the document in his personal capacity, its provisions are not binding upon him. When he subscribed his name to it as part of the signature of his company, he attested the truth of what the document states when it declares that it is made on his behalf and is binding in all its terms upon his legal representatives.

When a person signs a writing in a particular capacity—as an officer of the defendant company, in this case—he cannot, in my opinion, be allowed to disclaim an obligation stated in that writing to have been assumed by him, on the ground that he did not sign his name a second time, in his personal and individual capacity. This is clear when Lord Bramwell’s words in the case cited are recalled. There the point for decision arose upon demurrer to the defendant’s plea in answer to a declaration upon a charterparty drawn in a form which bound the defendants at law. Their signature was: “For A. Davidson and Co., Messina, T. W. & J. C. Harrop and Co., agents.” They pleaded that when the contract was signed it was agreed that the defendants were to sign only as agents to bind Davidson and Co., and were not to make themselves liable as principals for the performance of the charter—and that the plaintiff was inequitably taking advantage of the mistake in drawing the contract. The plea was held good in equity; and, according to Lord Bramwell, it seemed good also in law.

In the present case, Pattison intended to bind himself, as the writing states; and upon the faith of his agreement that he

was so bound the plaintiffs paid their money. I do not think there is any avenue of escape open to Pattison. The damages, however, as found by the trial Judge, after the parties by their counsel concurred in requesting that he should make the assessment, must be limited as stated in the judgment of my Lord the Chancellor—in the result of which I agree.

KELLY, J.:—I agree in the result.

*Judgment below varied.*

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[DIVISIONAL COURT.]

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*Physicians and Surgeons—College Council—Inquiry into Alleged Misconduct of Registered Practitioner—Ontario Medical Act, R.S.O. 1897, ch. 176, secs. 33, 35, 36—10 Edw. VII. ch. 77—Proceedings before Committee and Council—"Ascertain the Facts"—Necessity for Finding by Committee—Duty of Council—Decision upon Facts Found—Resolution of Council Directing Erasure of Name from Register—Appeal—Order upon—Further Inquiry by Council through Committee—Restoration of Name—Costs—Divisional Court—Final Court of Appeal—Authority of Previous Decision—2 Geo. V. ch. 17, sec. 10 (4).*

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Where a statute gives power to a smaller body to do any particular act for a larger body—for example, a board of directors for the shareholders of a company—the larger body is incapable of doing that act.

By secs. 33 and 35 of the Ontario Medical Act, R.S.O. 1897, ch. 176, as amended by 10 Edw. VII. ch. 77, upon the application of any four registered medical practitioners, an inquiry is to be made into the case of any person alleged to be liable to have his name erased from the register of the College of Physicians and Surgeons of Ontario, for infamous or disgraceful conduct in a professional respect. The inquiry is not to be made by the College Council, but caused to be made; and a standing committee is to be maintained for the purpose of making such inquiries. The Council "shall . . . ascertain the facts of such case by" this committee; and may act upon a written report of the committee. The Council, "on proof of such . . . infamous or disgraceful conduct, shall cause the name of such person to be erased from the register:"—

*Held*, upon an appeal under sec. 36 of the Act from an order or resolution of the Council directing that the name of S. should be erased from the register, that it is the duty of the committee, upon the true construction of the statutory provisions above summarised, to ascertain and find the facts and report their finding to the Council; and it is then the duty of the Council to decide whether the facts found are such as to shew that the accused has been guilty of infamous or disgraceful conduct in a professional respect.

And *held*, in this case—the committee which made the inquiry not having ascertained and found and reported the facts to the Council—that the resolution of the Council could not stand so as to cause an effective erasure of the name of S. from the register.

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And *held* (BRITTON, J., dissenting), that the proper order to make, under sec. 36 of the Act, was for an inquiry by the Council in the ordinary way, *i.e.*, by the standing committee—the members of the committee which made the inquiry being *functi*—and that pending the inquiry the name of S. should not be restored to the register, even if the Court had power to order restoration in the interval; and *semble*, *per* RIDDELL, J., it had not the power.

*Held*, as to costs, that, as all the proceedings in the way of taking evidence, etc., had been rendered useless by the error of the committee, the appellant, S., should have his costs of those proceedings paid by the Council; and he would also have been entitled to his full costs of the appeal, but for the faulty manner in which the appeal was brought before the Court; on that account, he should have no costs of the appeal, except a counsel fee to leading counsel; and the costs directed to be paid to the appellant should be set off against costs ordered in previous proceedings to be paid by him.

*Per* RIDDELL, J.:—Examination and discussion of various objections taken by the appellant to the proceedings by the committee and the Council. Some of these objections were adjudicated upon by RIDDELL, J., and by a Divisional Court, in *Re Stinson and College of Physicians and Surgeons of Ontario* (1910-11), 22 O.L.R. 627; and the conclusions thereon should, upon reconsideration, be adopted.

*Quere*, *per* RIDDELL, J., whether the enactment of 2 Geo. V. ch. 17, sec. 10 (4), altered the law laid down in *Canadian Bank of Commerce v. Perram* (1899), 31 O.R. 116, and subsequent cases, that, as a final Court of appeal in certain cases, a Divisional Court is not bound by the decision of any other Divisional Court.

AN appeal by Dr. Albert W. Stinson from an order of the Council of the College of Physicians and Surgeons of Ontario, made under sec. 33 of the Ontario Medical Act, R.S.O. 1897, ch. 176, directing that the name of the appellant should be erased from the College register. The appeal was taken under sec. 36 of the Act.

Many of the facts appear in the report of a previous motion and appeal relating to the inquiry which resulted in the order now appealed against: *Re Stinson and College of Physicians and Surgeons of Ontario* (1910-11), 22 O.L.R. 627. The evidence is stated in the judgment of RIDDELL, J., *infra*.

December 11. The appeal was heard by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.

*I. F. Hellmuth*, K.C., *A. B. Armstrong*, and *F. F. Hall*, for the appellant, after presenting again the arguments which had been urged before a Divisional Court against the inquiry proceeding at all, and which are set out in 22 O.L.R. at pp. 637, 638, argued that the Divisional Court now hearing the appeal was a final Court of appeal, and so not bound by the decision of any other Divisional Court, and that the provisions



of 2 Geo. V. ch. 17, sec. 10 (4), did not make any difference in that regard. They then submitted that there was no such report before the Council as it could rightly act upon under the provisions of R.S.O. 1897, ch. 176, secs. 33 and 35, and the amending Act, 10 Edw. VII. ch. 77. The committee should have not only presented evidence to the Council; they should have "ascertained," that is, found, the facts and presented them in a written report to the Council; and only on such a report could the Council act. This had not been done. The Council had no power to ascertain the facts. Where a statute gives power to a smaller body to do any particular act for a larger body, the latter is incapable of doing that act: *Hampson v. Price's Patent Candle Co.* (1876), 24 W.R. 754; *York Tramways Co. v. Willows* (1882), 8 Q.B.D. 685; *Stephenson v. Vokes* (1896), 27 O.R. 691. Therefore, the order of the Council that the name of the appellant should be erased from the College register could not be upheld.

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*D. L. McCarthy*, K.C., for the College Council, relied upon the reasons given in the judgments allowing the inquiry to proceed, as reported in 22 O.L.R. 627, and in answer to the argument that the Council had no power to ascertain the facts, he contended that, under a proper reading of the sections of the Acts in question, the Council had that very power, and were fully justified in passing the resolution to erase the appellant's name from the register. Under his reading of the sections in controversy, the Council itself was empowered to ascertain the facts, through the medium of the committee, which committee had done its full duty once it had assembled and taken the evidence.

*Hellmuth*, in reply.

December 30. RIDDELL, J.:—This is an appeal by Dr. Albert Stinson from an order of the Council of the College of Physicians and Surgeons of Ontario, made under sec. 33 of the Ontario Medical Act, R.S.O. 1897, ch. 176—the appeal being taken under sec. 36.

There are many grounds taken in the notice of motion; others were advanced upon the argument which, in view of the very

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great importance of the case—and counsel for the College not objecting—we permitted to be set up.

Some of the objections are the same as those urged against the inquiry proceeding at all, and these have been disposed of by the judgment of a Divisional Court on a former application in the same matter: 22 O.L.R. 627.

By the provisions of (1912) 2 Geo. V. ch. 17, sec. 10 (4), if it applies, we cannot depart from that decision “without the concurrence of the Divisional Court or the Judges thereof by whom the decision was given.” Of course, we should not ask for any such concurrence, unless we could find that the decision was, in our judgment, wrong.

It is argued that the statute just referred to does not alter the law under which we have held that as a final Court of appeal we are not bound by the decision of any other Divisional Court.

The former legislation is to be found in the Ontario Judicature Act, sec. 81 (2), Holmsted and Langton's Judicature Act, 3rd ed., p. 140: “It shall not be competent for the High Court or any Judge thereof in any case arising before such Court or Judge to disregard or depart from a prior known decision of any Court or Judge of co-ordinate authority on any question of law or practice without the concurrence of the Judges or Judge who gave the decision. . . .”

This Divisional Court in *Canadian Bank of Commerce v. Perram* (1899), 31 O.R. 116, held that this section did not apply to a Divisional Court sitting in appeal from an inferior Court, and, therefore, being the final appellate Court. The decision was followed by us in a number of cases from *Mercier v. Campbell* (1907), 14 O.L.R. 639, to *McManus v. Rothschild* (1911), 25 O.L.R. 138.

The Legislature interfered and made an express provision in (1912) 2 Geo. V. ch. 17, sec. 10 (4), that “it shall not be competent for any Divisional Court . . . in any case . . . to disregard or depart from any known prior decision of any other Divisional Court . . . whether it arose under section 74 or otherwise . . .” Appeals from County Courts are under sec. 74 of the Ontario Judicature Act; this appeal arises “otherwise.”

By reason of the course I pursue, I do not think it necessary now to decide whether we are bound by the new Act to follow the Divisional Court which gave a decision in this matter on a previous occasion, unless that Court or the Judges concur.

In view of the very great importance of this case from more than one point of view, I have thought it proper that I should again consider the points disposed of by myself on the previous motion; and, having given them full and careful consideration, I can see no reason whatever for receding from that decision in any particular—and I have nothing to add to what is contained in the report of the Divisional Court decision and my own.

It follows that the objections raised to the proceedings being taken by the committee fall to the ground.

The committee met on the 16th August, 1910, when, without objection on Dr. Stinson's part, the charge in respect of Mrs. Dale was gone into, but an objection was taken to going into the Johnston charge, and this objection was acceded to—or, at all events, no evidence was taken in respect of that charge. On the 2nd November the committee sat again. Counsel for Dr. Stinson objected (1) that both charges were "criminal offences," and, consequently, the committee had no jurisdiction. (This is the same as objection (3) in the former proceedings: see 22 O.L.R. at pp. 629 *sqq.*) They objected (2) that the Johnston charge should not be proceeded with. (This is the same as objection (2): 22 O.L.R. at p. 629). The committee then most properly adjourned to allow of a motion being made for prohibition; the motion failed. The adjourned meeting was to have been held on the 30th November, by which time the judgment of the Court of first instance had been delivered, but not that of the Divisional Court: 22 O.L.R. at p. 638. The committee sat again on the 17th January, 1911, and the inquiry proceeded, in presence of Dr. Stinson and his counsel, without objection. Upon the Dale case being gone into, Dr. Farley was called and gave evidence of facts and to a limited extent of his professional opinion concerning Mrs. Dale. Then the Johnston case was gone into. Mrs. Johnston herself was examined: then Dr. Hutchison in this case, as Dr. Farley in the other, as

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to the condition of Mrs. Johnston. Dr. Stinson himself gave evidence in both cases, which, if believed, would shew him innocent. He denies all charges of misconduct. Then Dr. Arthur Jukes Johnson was called; and, as some point was made of his giving evidence, it is as well to see what the circumstances are.

On the 14th December, 1909, Dr. Stinson had been tried before the sessions at Cobourg on a charge of procuring a miscarriage on Mrs. Dale. Dr. Johnson had been a witness for the Crown upon that trial. Upon a verdict of "not guilty" being given, Dr. Johnson joined Drs. Ivy, Elliott, Lapp, Ferris, Irwin, Jones, and McNichol, of Cobourg, and Dr. Farley, of Trenton, all members of the College of Physicians and Surgeons in good standing, in a written request, under sec. 33 (2) of the Act, to make inquiry into "the charge of disgraceful and unprofessional conduct preferred against Dr. A. W. Stinson, viz., of attempting to procure an abortion on Emma Dale." Counsel for the College upon this inquiry thought it wise that Dr. Johnson, having given evidence in the criminal Court, should also give evidence upon the College inquiry, not so much (as he explained to the Council) for the advantage of the Council, as "because the Courts who may have to review it will have the advantage of sworn evidence in connection with the matter." I can see no possible impropriety in Dr. Johnson giving evidence, under the circumstances, and am wholly confident that, had he not done so, a point would have been made of the omission; his subsequent conduct will be considered later.

He gave his evidence without objection—it was opinion evidence—and he was cross-examined. Dr. Stinson was then called, and gave opinion evidence against Dr. Johnson's opinion—Dr. Johnson's evidence being confined to the Dale case.

It is objected that expert evidence should not be called at all, as the committee itself is composed of medical men; but all medical men are not experts in all branches of medicine, surgery, midwifery; and I cannot see any objection to calling an expert, if necessary, to assist the committee—I should have more doubt whether the committee could proceed without evidence.



The committee made a report on the 27th July, 1911, by the hand of Dr. Klotz, one of its members. I think it well to set it out *verbatim*, as much depends on the contents:—

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“To the President and Members of the College of Physicians and Surgeons of Ontario.

“Gentlemen:—Your committee appointed to inquire into the facts *re* the complaint of Charles Rose against Albert W. Stinson, a duly qualified and registered medical practitioner, that he, the said Albert W. Stinson, had been guilty of infamous and disgraceful conduct in a professional respect, and had thereby rendered himself liable to have his name erased from the register of the College of Physicians and Surgeons of Ontario, beg leave to report as follows:—

“Notice of the charges which form the subject-matter of the inquiry to be conducted, and of the day appointed to hear the evidence in support of said charges, was served upon the said Albert W. Stinson; the full legal notice was given in the case referring to Emma Dale, but in respect to a woman named Johnston, the wife of Adam Johnston, sufficient notice for the hearing on Tuesday the 16th day of August, A.D. 1910, had not been given.

“Your committee duly met in pursuance of such notice, and the said Albert W. Stinson appeared personally and by counsel on the 16th day of August, A.D. 1910, at the hour of eleven o’clock in the forenoon, at the council chamber in the town hall in the town of Cobourg, in the county of Northumberland, when objection was taken to proceeding in the Johnston charge (particulars of which have been served), and evidence was taken in the Dale charge, and an adjournment made until Wednesday the 2nd November, A.D. 1910, at eleven o’clock, in the same place.

“Your committee duly met, in pursuance of such adjournment, on the 2nd day of November, A.D. 1910, at eleven o’clock in the forenoon, in the council chamber in the town hall at the town of Cobourg, for the purpose of proceeding with the evidence in the Johnston charge, when Mr. E. G. Porter, K.C., counsel for Dr. Albert W. Stinson, requested an adjournment and undertook to apply to the Court for a prohibition prohibiting the

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Discipline Committee and the Medical Council from proceeding to investigate the charges preferred.

“Your committee, upon advice of their counsel and upon the undertaking of Mr. E. G. Porter, counsel for Dr. Albert W. Stinson, to at once proceed with this application by way of prohibition, granted an adjournment, and adjourned until Wednesday the 13th November, A.D. 1910, at the same hour and place.

“In pursuance of said undertaking, counsel for the defendant applied for a writ of prohibition to issue, the same coming on for hearing before His Lordship Mr. Justice Riddell, of the King’s Bench Division of the High Court of Justice, and was refused.

“The defendant then appealed to the Divisional Court, the same coming on for hearing before the Common Pleas Division of the High Court of Justice, presided over by His Lordship Chief Justice Sir William R. Meredith, when the appeal was dismissed with costs.

“Your committee met and adjourned from time to time pending the said application for prohibition; and, upon the appeal being dismissed, your committee resumed its sittings at Cobourg on Tuesday the 17th January, A.D. 1911, at one o’clock in the afternoon, when the taking of evidence was completed.

“And your committee adjourned until Monday the 24th July, A.D. 1911, for the purpose of considering the evidence and determining upon the report.

“Your committee met on Monday the 24th July, A.D. 1911, at ten o’clock in the forenoon, at the council chamber in the Medical Council Building, No. 170 University avenue, Toronto, and the evidence was considered, and your committee determined to report the evidence and proceedings to your honourable body.

“Your committee returns with this report a transcript of the official stenographer’s report of the evidence taken on the said 16th day of August, A.D. 1910, and on the 17th day of January, A.D. 1911, and also copies of the exhibits referred to and filed, on the taking of the said evidence.

“Your committee beg leave to report the evidence and exhibits for your consideration, and for the determination of the

Council, and they have caused the said Albert W. Stinson to be notified to appear before Council on Thursday the 27th day of July, A.D. 1911, at two o'clock in the afternoon (or so soon thereafter as the case can be heard) to be heard before the said Council and to hear the Council's determination upon the evidence as reported by your committee.

"Dated at Toronto this 24th day of July, A.D. 1911.

"Signed on behalf of the College of Physicians and Surgeons of Ontario.

"J. A. ROBERTSON,

"*Chairman.*"

"Then Dr. Klotz moved, seconded by Dr. Hart, that the report be adopted.

"The President put the motion, which, on a vote having been taken, was declared carried.

"*Dr. Klotz:* It is moved by myself, seconded by Dr. Hart: 'That, whereas the Council of the College of Physicians and Surgeons of Ontario caused an inquiry to be made by the Discipline Committee of the said Council into the case of Albert W. Stinson, a duly qualified and registered medical practitioner, alleged to have been guilty of infamous and disgraceful conduct in a professional respect, and to be liable to have his name erased from the register thereof. And whereas the Council has duly ascertained the facts of the case in reference to the charges against the said Albert W. Stinson, by the action and report of the Discipline Committee of the said Council, duly appointed under the provisions of the Ontario Medical Act. And whereas the said committee has reported the evidence taken on such charges and copies of the exhibits referred to and filed therein, and the same is now before this Council for its consideration and the council has determined to act thereon. Now, therefore, be it resolved that the report of the said Discipline Committee, and the exhibits forwarded with said report in reference to the said Albert W. Stinson, be received, and that this Council is of the opinion that the charges preferred against the said Albert W. Stinson, that he did so act in the practice of his profession as a physician, while attending upon a woman named Emma Dale and while attending upon a woman named Johnston, the

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wife of Adam Johnston, as to be guilty of infamous and disgraceful conduct in a professional respect, and that he did, in or about the months of August and September, A.D. 1909, at the town of Cobourg, in the county of Northumberland, perform a criminal operation upon a woman named Emma Dale, whereby the said Emma Dale was caused to abort and to be prematurely delivered of a child, and that he did, in the month of April, A.D. 1909, perform a criminal operation upon a woman named Johnston, the wife of Adam Johnston, with intent to procure a miscarriage of said woman, contrary to the form of the statutes in such case made and provided, have been proved, and that the name of the said Albert W. Stinson be erased from the register of the College of Physicians and Surgeons, and that the Registrar be and he is hereby directed to erase from the register kept by him pursuant to the provisions of the Ontario Medical Act, the name of the said Albert W. Stinson. And it is further directed, under the provisions of the Ontario Medical Act, that the costs of and incidental to the said erasure be paid to the College of Physicians and Surgeons of Ontario, forthwith after taxation by one of the Taxing Officers of the High Court of Justice of Ontario, and the Registrar of the said Council is hereby directed, after such taxation, to obtain the issue of such execution or executions as may be necessary for the collection of such costs by the said College of Physicians and Surgeons of Ontario. Dated at Toronto this 27th day of July, A.D. 1911.' "

The following proceedings then took place:—

"*The President:* Gentlemen, you have heard the resolution moved by Dr. Klotz, seconded by Dr. Hart, regarding the matter of Albert W. Stinson, a duly qualified and registered medical practitioner, who is charged with infamous and disgraceful conduct in a professional respect. The matter is open for discussion of the meeting. I understand that Dr. Stinson is himself present; and, if he has anything to say in the matter, I am sure the Council will be glad to hear him briefly on the subject or any one representing him. If Dr. Stinson has anything to say, we would like to hear from him now."

Counsel for Dr. Stinson was then heard; and thereafter con-



siderable discussion took place on the resolution before the Council; it is plain that the members of the Council considered that they were trying the charges.

Some of the proceedings makes very unpleasant reading: we find that one medical man doubts whether "a man's living is to be taken away from him—is a man to be put out of the medical business if he commits an error . . .? Will it not give him notoriety in practice if he has been guilty of it to a great extent?" etc., etc. Quite regardless of the express duty imposed by the statute, sec. 33 (2)—"on proof . . . of such infamous or disgraceful conduct, shall cause the name of such person to be erased from the register"—he argued that suspension for a certain length of time would be better than striking the man's name off the register. An amendment was moved and seconded that the "Council suspend its verdict in the meantime, and that Dr. Stinson be given a chance to pay the expenses of the investigation and so on." Some of the Council most properly protesting against the last clause of the proposed amendment, it was dropped, and it then read "that the Council suspend action in the case of Dr. Stinson." The amendment was lost; and then by eleven to ten the original motion carried.

Thereupon the member who had moved the amendment suggested that eleven was not a majority of the Council; and, as the vote was so close, it would be wise to reconsider the matter. Thereupon a motion was made, seconded, and carried, to reconsider the matter the following morning—and then the motion was carried unanimously.

In the following July, the next meeting of the Council was held. The official report of what then took place begins thus:—

"Dr. Griffin presented and read the report of the Discipline Committee re Dr. Albert W. Stinson, as follows:—

"COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO.

"IN THE MATTER OF an inquiry directed to be held by the Council of the College of Physicians and Surgeons of Ontario into the case of Albert W. Stinson, a duly qualified and registered medical practitioner, alleged to be liable to have his name erased from the register of the said College, by reason of infamous and disgraceful conduct in a professional respect.

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“Moved by Dr. Griffin, seconded by Dr. Klotz: ‘That, whereas the Discipline Committee of the College of Physicians and Surgeons, on the 24th day of July, A.D. 1911, made their report to the Council of the College of Physicians and Surgeons in respect to the conduct of the said Albert W. Stinson. And whereas by resolution of the Council, the consideration of the report was deferred until the general meeting of the Council to be held in July, 1912. Now therefore be it resolved that the report of the said Discipline Committee, and the exhibits forwarded with said report in reference to the said Albert W. Stinson, be received, and that this Council is of the opinion that the charges preferred against the said Albert W. Stinson, that he did so act in the practice of his profession as a physician, while attending upon a woman named Emma Dale, and while attending upon a woman named Johnston, the wife of Adam Johnston, as to be guilty of infamous and disgraceful conduct in a professional respect, and that he did, in or about the months of August and September, A.D. 1909, at the town of Cobourg, in the county of Northumberland, perform a criminal operation upon a woman named Emma Dale, whereby the said Emma Dale was caused to abort and to be prematurely delivered of a child, and that he did, in the month of April, A.D. 1909, perform a criminal operation upon a woman named Johnston, the wife of Adam Johnston, with intent to procure a miscarriage of said woman, contrary to the form of the statutes in such case made and provided, have been proved, and that the name of the said Albert W. Stinson be erased from the register of the College of Physicians and Surgeons, and that the Registrar be and is hereby directed to erase from the register kept by him pursuant to the provisions of the Ontario Medical Act, the name of the said Albert W. Stinson. And it is further directed, under the provisions of the Ontario Medical Act, that the costs of and incidental to the said erasure be paid to the College of Physicians and Surgeons of Ontario, forthwith after taxation by one of the Taxing Officers of the High Court of Justice of Ontario, and the Registrar of the said Council is hereby directed, after such taxation, to obtain the issue of such execution or executions as may be necessary for the collection of such

costs by the said College of Physicians and Surgeons of Ontario.  
Dated at Toronto this 4th day of July, A.D. 1912.'''

It is evident that there is an error in this—the only written report of the committee submitted has been already set out—what took place, evidently, is, that Dr. Griffin presented and read that report, and then moved the above as a resolution. For this is what follows:—

“*Dr. Griffin*: This case, if you remember, Mr. President, came up at the last session of the Council, and this resolution carried by a small majority of the Council, and it was then, on reconsideration, directed to be held over for another year. The committee, in considering this case, came to the conclusion that the ends of justice would be best served by having the name of Dr. Stinson stricken from the roll in accordance with the resolution of last year.

“*The President*: You have heard the resolution *re* Dr. Stinson, moved by Dr. Griffin and seconded by Dr. Klotz. Dr. MacColl has drawn my attention to the fact that there are some new members in this Council at the present time who possibly have not read that evidence, and the legality of our action might be thereby affected.

“*Dr. Gibson*: They can abstain from voting.

“*The President*: And that will not affect the legality of our action?

“*Voices*: No.

“The yeas and nays were then taken on the above resolution, and resulted as follows:—

“*Yeas*: Drs. Bascom, Cruickshank, Emmerson, Ferguson, Gibson, Sir James Grant, Griffin, Hart, Jarvis, King, Klotz, MacArthur, MacColl, S. McCallum, Routledge, Ryan, Spankie, Stewart, Vardon, Welford, Wickens—21.

“*Nays*: None.

“The president declared the motion carried and the report adopted.”

We have been furnished with one printed copy of the proceedings in the Council. From this it appears that the gentleman who thought—or at least argued—that suspension would be sufficient punishment, voted for suspending action with the

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minority at the first 1911 meeting, and against the motion to strike off the register. It was he also who seconded the amendment which, as first proposed, was, "that the Council suspend its verdict for the meantime and that Dr. Stinson be given a chance to pay the expenses of the investigation and so on." He seems to have previously read the evidence; and, when he votes in 1912 for striking the name of Dr. Stinson off the register, it is argued that he must have done so to punish him for not paying the costs. I have read the report of Dr. V.'s speech again and again; and, while he protests against the Council convicting on evidence upon which the criminal Court acquitted, I do not think he can be said to have exhibited any signs of believing in the actual innocence of the accused. No doubt, he is strongly inclined to leniency in punishment, like very many jurors and perhaps some in other positions of responsibility. There is nothing whatever to indicate any corrupt or improper motive or intention, and nothing to indicate that Dr. V. did not honestly and in perfect good faith vote in 1912 against the accused.

Dr. Y., the most prominent advocate in 1911 of St. Stinson, did not vote in 1912. Dr. G., at the first meeting in 1911, said he had not been able to arrive at any other conclusion than that the offence, to his mind, had not been sufficiently proved against Dr. Stinson to justify him in voting that he is guilty of the offence. He said he had gone over the mass of evidence and made a very conscientious endeavour to arrive at a decided opinion—and he adds that, possibly, had he heard the evidence, his opinion might have been somewhat different. He voted against the motion to strike off the register in 1911, but for the resolution in 1912.

Dr. G., who moved the amendment in 1911, voted for the motion in 1912, as did Sir J. G., Dr. J., Dr. K., Dr. R., Dr. W., Dr. S. McC.—making eight in all who voted against striking off the register in 1911 but for that course in 1912; and it is urged that these voted thus to punish Dr. Stinson for not paying the costs. This most serious imputation against members of the medical profession there is not the slightest foundation for—and, to me at least, it is a matter of regret that it ever



should have been made. Outside of Dr. G., I do not find any intimation of opinion by any of these at the meeting in 1911 that Dr. Stinson had not performed the illegal operation.

Nothing indicates anything like personal feeling against the accused—and the Council seem to have acted with scrupulous fairness.

So, too, with the committee; from a repeated perusal of the evidence, I am convinced that the committee performed a most distasteful duty with perfect fairness—and that the appellant has nothing to complain of in that respect.

Dr. Johnson is a member of the Council; having been called on the inquiry as a witness, he took no part in the Council in voting or discussion in 1911 or 1912—the only thing he did was, when his conduct was called in question, to explain to the Council how he came to be called as a witness—and his action throughout, to my mind, is wholly unexceptionable.

The evidence upon the inquiry was such, with or without the evidence of Dr. Johnson, that the Council or the committee might well find that Dr. Stinson had been guilty of criminal malpractice in the cases of both Mrs. Dale and of Mrs. Johnston—and might well find that he had been guilty in both cases of infamous and disgraceful conduct in a professional respect. And I cannot find the slightest evidence of want of perfect good faith on the part of either Council or committee.

What I have said disposes, to my mind, of most of the grounds taken in the notice of motion.

Reason (1) was not argued, and no facts are made to appear upon which it could be based; No. 2 is substantially an objection to the supposed finding of the committee, as against evidence. There is nothing in this—and I pass it over for the moment. No. 3 is quite without merit, and was not argued. No. 4 is objection No. 3 referred to in 22 O.L.R. at p. 629 *sqq.*; No. 5 is No. 2 in 22 O.L.R. at p. 629; No. 6 is in part the same as No. 4 above, and in part a confounding of the two classes of cases in sec. 33 (1) and an attempt to make them but one; No. 7 I have dealt with. No. 8 was not argued—it reads thus: “8. That the Council, having dealt with the matter in July, 1911, and having passed upon same without directing the erasure

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of the appellant's name from the register, had no jurisdiction or power, one year later, to reopen the matter, and, at that date and upon another vote, order the erasure of the appellant's name from the register." This was not pressed—for obvious reasons. If the Council had not the right to open up the vote of the first day of the 1911 meeting and reconsider the matter, the only valid resolution is adverse to the appellant—the resolution now moved against is wholly unnecessary, and the appellant would receive no advantage from its being set aside.

This disposes of the grounds taken on the notice of motion: but the grounds which we allowed to be taken at the hearing (*dehors* the notice) are not so easily disposed of—these involve matters of law.

The Act now in force is R.S.O. 1897, ch. 176, as amended by (1910) 10 Edw. VII. ch. 77—and the sections which require attention are secs. 33, 35, 36. The two former read (so far as important in this inquiry):—

“33.—(1) Where any registered medical practitioner has . . . been guilty of any infamous or disgraceful conduct in a professional respect, such practitioner shall be liable to have his name erased from the register.

“(2) The Council or the executive committee . . . upon the application of any four registered medical practitioners shall cause inquiry to be made into the case of a person alleged to be liable to have his name erased under this section and on proof of such . . . infamous or disgraceful conduct *the Council* shall cause the name of such person to be erased from the register . . . .”

“35.—(1) The Council shall, for the purpose of exercising in any case the powers of erasing from and of restoring to the register the name of any person . . . ascertain the facts of such case by a committee of their own body not exceeding five in number, of whom the quorum shall be not less than three, and a written report of the committee may be acted upon for the purpose of the exercise of the said powers by the Council.

“(2) The Council shall from time to time appoint and shall always maintain a committee for the purposes of this section . . . .”

The words italicised were introduced by 10 Edw. VII. ch. 77, on the 19th March, 1910. The change will not perhaps affect the present case, and is, for the purposes thereof, wholly immaterial.

It seems to me that there can be no doubt as to the meaning of the statute in most respects. For this case: (1) Upon the application of any four registered medical practitioners, an inquiry is to be made into the case of any person alleged to be liable to have his name erased for infamous or disgraceful conduct in a professional respect. (2) This inquiry is *caused to be made* by the Council, as the Act formerly stood—not *made* by the Council itself. (3) A standing committee is to be maintained to make such inquiries. (4) The Council “shall . . . ascertain the facts of such case by” this committee. (5) And may act upon a written report of the committee. (6) The Council, “on proof of such . . . infamous or disgraceful conduct, shall cause the name of such person to be erased from the register.”

There is no doubt that (1), (2), and (3) were duly performed.

But, when we come to the remaining three, there is a great difference. The Council is to cause inquiry to be made into the case and “ascertain the facts of such case” by the committee. The expression “the facts of the case” does not or may not mean an opinion as to the culpability of the conduct of a medical man; but must mean at least the conduct itself—the facts upon which an opinion is to be founded.

It has long been well settled that where a statute gives power to a smaller body, a board of directors, etc., to do any particular act for the larger, the company, etc., the larger body, etc., is incapable of doing that act: *Rex v. Westwood* (1830), 4 Bli. N.R. 213, 4 B. & C. 781, at p. 799; *Hampson v. Price's Patent Candle Co.*, 24 W.R. 754; *York Tramways Co. v. Willows*, 8 Q.B.D. 685, at p. 689, *per* Manisty, J.; p. 695, *per* Coleridge, C.J.; *Stephenson v. Vokes*, 27 O.R. 691. No body but the committee can “ascertain the facts”—and this does not mean “take the evidence of witnesses from which the facts may be ascertained.” “Ascertain” must mean “decide upon:” *Regina v. Inhabitants*

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of *Heyop* (1846), 8 Q.B. 547, at p. 559; "make certain," "fix," "settle," "determine," "establish."

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*Brown v. Lyddy* (1877), 11 Hun 451, at p. 456, *Russell v. Hartt* (1881), 87 N.Y. 19, *State ex rel. Thayer v. Boyd* (1891), 48 N.W. Repr. 739 (Nebr. S.C.), *Braunstein v. Accidental Death Insurance Co.* (1861), 31 L.J. Q.B. 17, at p. 24, may also be looked at.

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I search in vain for any finding of fact by the committee; there is a mass of evidence from which a finding may be made. But, as was pointed out in the discussion in the Council, that finding depends on the credit to be attached to the witnesses: "If the evidence of that woman (Mrs. Johnston) is to be believed at all, I believe Dr. Stinson is guilty." "It altogether depends on the doctor's reliability as a witness."

It was, to my mind, the plain duty of the committee to pass upon the credibility of the witnesses, and, upon such evidence as they believed, find, ascertain, the facts. It is quite true that Dr. K., who was a member of the committee, says: "I heard the doctor's evidence and that of the two witnesses principally involved, and I can only form my own judgment from the manner in which the evidence appeals to me; and, in my mind, there is not the slightest question of doubt as to the doctor's guilt." The forming of such a judgment was what Dr. K. and his associates should have done in the committee, not in the Council.

That Dr. S. also was of this opinion appears probable, if not certain, from the fact of his voting with Dr. K. in 1911 to strike off the register—but Dr. R., the third member and chairman of the committee, does not vote at all, either in 1911 or in 1912.

There can be no kind of doubt, I venture to think, that there has been no ascertaining of facts by the statutory body charged with that duty; and there was nothing upon which the Council could validly act.

As to what is to be found, ascertained, by the committee, I think that they should find specifically all the facts which will enable any tribunal charged with that duty to determine whether the conduct complained of and found comes within the statute.

The provision as to a written report is curious—it is not "the



Council may act upon a report of the committee," or even the Council may act upon a written report of the committee," but "a written report of the committee may be acted upon by the Council." Of course, no committee possessed of any sense—and there are such—would, in view of the provisions of the statute, think of substituting an oral report for a written report—although what is meant may well be only that the Council need not require a report orally with all the committee present, etc., but may accept and act upon a written report: not wholly unlike the case of a jury, who generally give their verdict orally in open Court, but are sometimes permitted to give a verdict in writing, the Court not sitting. As at present advised, I think that this is the meaning. In view of the mandatory provisions of sec. 33, I do not think that the Council has an option to act or not to act when the committee have ascertained the facts—the "may" does not refer to a discretion left to the Council to act or not to act, but to act, if so inclined, upon a written report, instead of requiring the committee to attend in person and report in that way.

But, a report being made—at least a report in writing—the Council still has duties before the order is made to erase the name of the alleged offender from the register. This can be done only "on proof . . . of such infamous or disgraceful conduct." That—so far as it is a matter of opinion—must, in my view, be a question for the Council. Upon the facts as found by the committee, the Council must decide whether the facts so found—and, therefore, for the Council, proved—are such as to shew that the accused has been guilty of infamous or disgraceful conduct in a professional respect. I see no provision for an appeal from the findings of the committee to the Council on the facts of the case—that is something outside the function of the Council altogether. Their sole duty is to direct their minds to applying the facts—not to disputing them.

Neither an ascertaining of the facts nor a report of the same having been made by the committee, the resolution of the Council cannot stand so as to cause an effective erasure of the name of Dr. Stinson from the register.

We now turn to sec. 36 for guidance as to the course to

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pursue—and it is, at least in part, to determine the meaning of this section, that I have considered the duty of the Council somewhat at length.

On this appeal we may: (1) order restoration of the name of Dr. Stinson to the register; or (2) confirm the erasure; or (3) order further inquiry by the (a) committee or (b) Council into the facts of the case—as well as dispose of the costs.

In the present case, the whole difficulty is, that the Council and the committee did not do what the statute calls upon them to do—a more striking example of “how not to do it” is seldom met with—and, if that can now be done, it should be done.

The only “further inquiry by the . . . Council” which the Council could make would be: (1) an inquiry from the committee as to the facts of the case found by them; or (2) an inquiry by the Council by means of a committee, the standing committee: sec. 35 (1), (2). Had the committee which sat to hear the evidence remained in office, I see no difficulty or impropriety in an order that the Council should make further inquiry into the facts of the case by requiring that committee to make a report of the facts of the case upon which the Council could legally act. But the members who sat to hear the case are not now on the committee—they are *functi*—the personnel is entirely changed; and no finding by the members of the former committee would be now a finding by the committee: *D’Arcy v. Tamar Kit Hill and Callington R.W. Co.* (1867), L.R. 2 Ex. 158; *In re State of Wyoming Syndicate*, [1901] 2 Ch. 431, 432; *In re Haycraft Gold Reduction and Mining Co.*, [1900] 2 Ch. 230, 235; *Bosanquet v. Shortridge* (1850), 4 Ex. 699; *In re George Newman & Co.*, [1895] 1 Ch. 674, 686.

The committee which heard the evidence cannot now sit at all. The only inquiry that can be ordered to be made by the Council is an inquiry by the Council in the ordinary way, i.e., by the committee—and that should now be ordered.

The power given the Court to order further inquiry by the committee is, I think, intended to cover irregularities or worse at the hearing, the committee having remained intact.

It seems to me that the three courses which this Court may pursue are mutually exclusive—we are not expressly given the

power to restore the name during the pendency of further inquiry where further inquiry is directed, as we are (by means of an "and") given the power to deal with the costs, whatever we do. And, even if we had that power, I do not think it should be exercised.

Evidence is given which, if believed, would not only justify but necessitate a finding that this practitioner was guilty of two disgraceful crimes; that one of the three members of the committee believed this evidence, he himself asserts in Council; that another felt the same way is reasonably clear, as he voted for a resolution declaring Dr. Stinson guilty of these crimes; that the third did not agree is not even suggested by the appellant or any of his sympathisers (I do not use the word in any derogatory sense) in the Council. The whole membership of the Council in 1912 (twenty-one in all) thought him guilty. The only reason the action of the Council is not effective is, that the statutory method of proceeding was not strictly complied with, as it should have been—I think, therefore, that, even if we had the power to restore the name in the interval, we should not do so.

As to costs, all the proceedings in the way of taking evidence, etc., have been rendered useless by the error of the committee—the appellant should have those paid by the Council. The costs of the appeal, I should hold, should also be paid to the appellant but for the manner in which the appeal was brought before us. No possible complaint—rather the contrary—can be laid at the door of counsel; counsel instructed the solicitor to furnish copies of all papers to be relied upon for the use of the members of the Court—this was not done, and much difficulty was experienced in following the argument. Such neglect is inexcusable; and, indeed, no excuse or explanation is offered. Except one counsel fee to leading counsel, I think the appellant should have no costs of the appeal.

These costs directed to be paid to the appellant may be set off against any costs ordered in the previous proceedings to be paid by him, if any remain unpaid.

The order will be that the Council make further inquiry into the facts of the case; costs as above.

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FALCONBRIDGE, C.J.:—I agree in the result.

BRITTON, J.:—This is an application by Stinson by way of appeal from the order of the Council of the College of Physicians and Surgeons of Ontario whereby Stinson's name was ordered to be erased from the register of said College as one of the physicians of the Province of Ontario.

In the notice of motion many grounds of appeal are stated. I do not deem it necessary for me to deal with any of these. Upon the argument Mr. Hellmuth, for the appellant, raised as a specific objection that there was no finding of fact by the committee of the Council, and no report of any findings by that committee.

That seems to me decisive that this appeal must be allowed.

Section 33, sub-sec. 1, of ch. 176, R.S.O., is as follows: "Where any registered medical practitioner has either before or after the passing of this Act, and either before or after he is registered, been convicted either in Her Majesty's dominions or elsewhere, of an offence which, if committed in Canada, would be a felony or misdemeanour, or been guilty of any infamous or disgraceful conduct in a professional respect, such practitioner shall be liable to have his name erased from the register."

Where it is alleged that a practitioner is liable to have his name erased under the section first-cited, then, on proof of such conviction, or on proof of such infamous or disgraceful conduct, the Council shall cause the name of such person to be erased from the register. Since the Act of 10 Edw. VII. ch. 77, sec. 2, sub-sec. 1, the executive committee of the Council may cause the name to be erased.

The proof required is to be sought for when any four registered medical practitioners make application for an inquiry; and the Council shall, upon such application, cause inquiry to be made into the case of the person so alleged to be liable to have his name erased.

Section 35 (1): "The Council shall, for the purpose of exercising in any case the powers of erasing from and restoring to the register the name of any person or any entry, ascertain the facts of such case by a committee of their own body . . . and a written report of the committee may be acted upon for the purpose of the exercise of the said powers by the Council."



The Council must appoint and always maintain a committee for the purpose of sec. 35; that is, to ascertain the facts and to make to the Council a written report—a written report of the findings of the committee, not merely the evidence, which might be true or false.

Sub-section 5 of sec. 35 states that the report there mentioned is to be the committee's "report of the facts."

In this case there was no finding of facts by the committee—and, of course, no report of the facts. The evidence only was reported.

The appeal, therefore, should be allowed. The appellant's name was improperly erased and should be restored.

Section 36 provides that the Divisional Court may, upon hearing the appeal, make such order as to the restoration of the name to the register as to the Court shall seem right in the premises.

Section 34 provides that a name erased from the register by the Council may be restored by the order of a Divisional Court of the High Court of Justice. The appellant has not been found guilty by any Court—or by the committee of the Council. It is important that the name of the appellant should not be erased from the register until proof—in the manner prescribed—should be made, and a conviction or finding upon the evidence be made. The legislation was obtained at the instance of the College of Physicians and Surgeons, and for the supposed benefit and protection of the whole profession, as well as the public. The Act requires, and very properly so, the strictest proof, and in the manner prescribed, of infamous or disgraceful conduct in a professional respect, before the name of a person so charged can be erased. That proof has not been made, nor has there been any finding upon the evidence adduced. I do not feel myself at liberty to say that I think the appellant guilty. That is not my province. I am not the trial tribunal. The appellant may well say to the Council: "You appeal to the statute—to the statute you must go."

The appeal should be allowed with costs to the appellant. Against such costs should be allowed and set off *pro tanto* any costs owed by the appellant to the respondents. An order should

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go to restore the name of the appellant to the register. No direction should be given to the Council as to any other or further proceedings in this case—but the judgment should not prejudice the Council as to any other proceedings they may take. The Council should be at liberty to take such further or other proceedings under the statute as they may deem best.

*Order as stated by RIDDELL, J.*

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LINDSEY v. LE SUEUR.

*Author—Preparation of Biography—Access to Private Collection of Documents—Misrepresentation as to Character of Proposed Work—Undertaking—Breach of Faith—Delivery up of Extracts and Copies—Use of Information Obtained—Restraint of—Injunction—Nominal Damages.*

Where a person obtains possession of or access to property of another, by misrepresentation or by concealment of facts which he was bound to disclose, he will be restrained from making use of that property.

The defendant, as the result of the judgment in *Le Sueur v. Morang & Co. Limited* (1910), 20 O.L.R. 594 (affirmed by the Supreme Court of Canada, *Morang & Co. v. Le Sueur* (1911), 45 S.C.R. 95), obtained possession from the defendants in that action of his manuscript "Life of William Lyon Mackenzie," which had originally been prepared for publication as a volume in the series called "The Makers of Canada," and proposed to publish it. When the defendant was preparing to write the "Life" for that series, the plaintiff, who was the grandson of William Lyon Mackenzie, allowed the defendant free access to his collection of books and papers called "the Mackenzie Collection," and the defendant made extracts therefrom and copies thereof and obtained information therefrom which he used as part of the material for his book:—

*Held*, upon the evidence, that the defendant had made use of the books and papers otherwise than in accord with the representation made by him to the plaintiff and the understanding between him and the plaintiff, which was, that he was to write a favourable or sympathetic account of the life and character of the subject, whereas the manuscript proposed to be published disclosed an opposite purpose and result.

*Held*, therefore, that the plaintiff was entitled to have delivered to him all the extracts from and copies of documents in the collection made by the defendant; to have the defendant restrained from publishing any book containing any of the extracts or copies or information obtained from the collection; and to nominal damages.

ACTION by George G. S. Lindsey to compel delivery by W. D. Le Sueur, the defendant, to the plaintiff, of certain documents and extracts and copies of documents which the defendant had, and which he had obtained from the collection of the late

William Lyon Mackenzie, and for an injunction restraining the defendant from publishing or making public any of these documents or copies of or extracts from them.

The action concerned the publication of a book that was in question in *Le Sueur v. Morang & Co. Limited* (1910), 20 O.L.R. 594; *Morang & Co. v. Le Sueur* (1911), 45 S.C.R. 95.

The defendant counterclaimed damages occasioned by the plaintiff's interference with the publication of his book.

November 11-14, 1912. The action was tried before BRITTON, J., without a jury, at Toronto.

*I. F. Hellmuth*, K.C., for the plaintiff.

*G. F. Shepley*, K.C., and *H. P. Hill*, for the defendant.

January 9, 1913. BRITTON, J.:—The late Charles Lindsey was the son-in-law of the late William Lyon Mackenzie. The plaintiff, George G. S. Lindsey, is the son and sole executor of Charles Lindsey. Charles Lindsey was the owner of a large and valuable collection of books, papers, manuscripts, letters, etc., which had been the property of William Lyon Mackenzie. Prior to February, 1906, the publishing firm of Morang & Co. had determined to have written, for publication and sale, books on "The Makers of Canada."

To carry out this purpose, Morang & Co. chose to include William Lyon Mackenzie in the series, and they employed the defendant to write that book.

In February, 1906, Charles Lindsey resided with the plaintiff; and at that time the defendant sought and obtained an introduction to the plaintiff, and requested to be allowed access to the Mackenzie collection. It is alleged that the defendant represented to the plaintiff that he, the defendant, had undertaken to write the life of Mackenzie for the Morang & Co. series; that the life so written would be to the satisfaction of Morang & Co.; and that it would be published in the series mentioned. It is further alleged that the defendant represented that the work would be entered upon by him in sympathy with the character he was to depict, exhibiting in the book Mackenzie as one of "The Makers of Canada." Upon this representation, the plaintiff, acting for his father, allowed the defendant free access

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to the collection to make copies of and extracts from documents, and, generally, to obtain such information as was available.

The defendant for months resided in the plaintiff's house, and while there obtained the information sought.

The defendant completed his manuscript, sent it to Morang & Co., and it was rejected.

The plaintiff says that, by necessary implication from what took place, the agreement was, that the defendant, in writing such life of Mackenzie, as one of the class mentioned, would make fair use of the material he found. The plaintiff charges that the defendant did not do so, and for that reason the life written by the defendant was partizan and unfair; and, in consequence thereof, the manuscript was rejected.

I have spent a great deal of time in reading with care most of the evidence, given at great length upon the trial of this action. No useful purpose will be served by my referring at length to or quoting from the evidence.

It seems to me clear that the plaintiff and the late Charles Lindsey supposed that the defendant intended to write of William Lyon Mackenzie as one of the men in Canadian history who can fairly be called, speaking colloquially, one of the "Makers of Canada." The conduct of the defendant, and what he said, warranted the plaintiff and Charles Lindsey in so thinking. I must find as a fact that the defendant gave the plaintiff and Charles Lindsey to understand that the views and feelings of the defendant towards Mackenzie were friendly; that his attitude in presenting Mackenzie to the public was a fair one; that he had no bias against Mackenzie; and that he had no feeling or opinion which would prevent him, as a writer, from truly presenting the facts and circumstances of Mackenzie's life and character. The defendant, in my opinion, intended that the plaintiff and Charles Lindsey should believe as they did in reference to the defendant's feeling and attitude.

At the time of the defendant's arrangement with the plaintiff, the defendant did hold strong views against Mackenzie. At that time the defendant intended to write the life of Mackenzie on other than "conventional lines." He intended to write of Mackenzie, not as one of "The Makers of Canada," in



the general acceptance of that term, but as a "puller down," as was stated during the trial.

I deal with this matter simply as a matter of contract and good faith between the parties, not expressing any opinion as to whether the defendant is right or wrong in his estimate of Mackenzie. It does not, so far as it affects this case, except as a matter of good faith on the part of the defendant, make any difference whether Mackenzie was a man of high aims and unselfish purpose, contending against real wrongs permitted by bad laws and perpetrated by unjust administration, or a mere adventurer, willing to point where he would not lead, a mere inciter to rebellion against laws that were just, and administered by men able and honest.

I quite recognise that the biographer should write truly of his subject. He should not, as the defendant said he would not, write any fairy tale or Jack the Giant-killer story. The defendant could write truly of the life selected, and draw such inferences as might please him from the facts; and any quarrel with his inferences would be in the nature of fair discussion. But this is a question of how the defendant came to get possession of what is now the plaintiff's property, and of the use he made of it, as distinguished from the use the plaintiff supposed the defendant would make of it, and as distinguished from the use the defendant led the plaintiff to think would be made of it, and as to the use the defendant now proposes to make of it.

If the defendant obtained possession of or access to property now belonging to the plaintiff, by misrepresentation or by concealment of facts which he was bound to disclose, then he must not further use that property.

I am of opinion, upon the evidence, that the defendant made use of the Mackenzie collection of books and papers otherwise than was in accord with the understanding between him and the plaintiff and Charles Lindsey.

The use made was contrary to the wish, and contrary to what was known to be the wish of the plaintiff, and contrary to the wish of the plaintiff's father. It is inconceivable, upon the facts, that either Charles Lindsey or the plaintiff would have permitted access to the Mackenzie papers had either known or sup-

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posed that such a manuscript as the defendant produced would have resulted. It is plain to me that the defendant knew that he could not have obtained access to the collection, had he revealed his true feelings or declared his real intention.

No question of copyright is involved. It is a question of getting access to the house of another and using the property therein for personal purposes different from what was consented to by the owner.

It has been held that to permit publication of musical compositions in "volume form" does not amount to a permit to publish one by one in a serial form: *In re Jude's Musical Compositions*, [1907] 1 Ch. 651.

It is not the right of a party to an action, who has obtained access to the papers of his opponent for use in the action, to make the papers public.

Just before the defendant's arrangement with Morang & Co., the life of William Lyon Mackenzie had been written by Mr. Hughes for the series mentioned. The criticism by the defendant upon the work of Mr. Hughes was severe. It was, in part at least, instrumental in having that work rejected by Morang & Co. The defendant, I think, intended that rejection should result. The language used in correction was such as to evince irritation on the part of the defendant at times when words of praise or commendation of William Lyon Mackenzie were used. The defendant concealed from Charles Lindsey and from the plaintiff the fact of his criticism of the work of Mr. Hughes. Whether the criticism was just or not—and assuming that the defendant thought it just—he should have informed Charles Lindsey or the plaintiff of it. The plaintiff is entitled, in his own right, to maintain this action. He is, as I have more than once stated, now the absolute owner of the Mackenzie collection, and is seeking to protect it from its unauthorised use by the defendant.

The plaintiff is not suing for and is not entitled to recover damages, if any, that accrued to Charles Lindsey in his lifetime. It is open to the plaintiff to say, if according to the facts, that the defendant improperly obtained access to the collection; that, when access was obtained, the defendant made an unfair use of

the privilege; and that, the purpose for which he obtained access having been served, the defendant is not entitled further to deal with the extracts and copies made. It is not a question of damage to Charles Lindsey or of the survival of any right of action he had. Charles Lindsey did not so deal with this collection, by contract or consent or otherwise, as to prevent the plaintiff now asserting his right to guard it. Charles Lindsey permitted the defendant to use the collection to assist the defendant in writing a book to be published by Morang & Co. That book has not been published by them, and will not be. All negotiations between the defendant and that firm are at an end. The defendant has no right, as against the plaintiff, to have a book, the one written, or another book, using the extracts or copies from the plaintiff's collection, published elsewhere.

The statement of defence mentions the action of the defendant against Morang & Co., reported in appeal in 20 O.L.R. 594, and states, in substance, that the plaintiff took part in that for Morang & Co. In that action, very likely, evidence was given the same in part as was produced by the plaintiff on the trial of this action. No doubt, the plaintiff herein sympathised with Morang & Co., and possibly assisted in the defence. That is not material. The plaintiff was not a party to that action. There is no estoppel.

The plaintiff, before action, demanded from the defendant a return of the extracts and copies and an assurance that he would not publish them or make use of information derived from the collection. The defendant refused to deliver up the extracts and copies, and expressed his intention of publishing them in book form. In fact, the defendant, by counterclaim, alleges that, shortly before the commencement of his action, he was entering into arrangements for the publication of his book, and claims damages because of the plaintiff's interference. As to the "information" said to have been obtained by the defendant from the collection, it will be difficult, if not impossible, for even the defendant, at this stage, to say just what particular fact was learned there, instead of from the book of Charles Lindsey, or some other writer, or elsewhere.

The plaintiff is entitled: (1) to an order requiring the defen-

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dant to deliver up to the plaintiff all of the extracts from and copies of any documents in the William Lyon Mackenzie collection mentioned in the statement of claim; (2) to an order restraining the defendant, his servants and agents, from publishing or causing to be published any book which contains any of the said extracts or copies, or that contains information avowedly obtained from the Mackenzie collection.

The plaintiff has not sustained any substantial pecuniary damages, but a legal injury will be done if the collection without his consent is interfered with, and he is entitled at least to nominal damages, say \$5. The judgment will be with costs, payable by the defendant to the plaintiff. The counterclaim will be dismissed with costs. If any difficulty is found as to form of judgment, I may be spoken to on settling the minutes.

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*Crown—License of Occupation of Lands Covered by Water—Fisheries—Lands Included in Prior Grant—Description — Island in Navigable River—Area of Lands Granted—Adjacent Marshes—Ambiguous Description—Evidence to Identify Subject of Grant—Admissibility—"Channel," Meaning of—Boundary—Channel-bank — Misrepresentation by Licensee—Suppression of Material Facts—Fraud — Presumption—1 Geo. V. ch. 5—Cancellation of License—Parties—Attorney-General.*

In 1827, the Crown issued to P. a license of occupation for an island in the Detroit river called "Fighting Island," "containing by computation about twelve hundred acres." In 1863, an order in council was passed accepting a surrender of the island to the Crown by the Wyandotte Indians; and on the 28th June, 1867, a patent of the island from the Crown to P. was issued, expressing that, in consideration of \$6,000 paid by P. to the Superintendent of Indian Affairs, Her Majesty had granted to P., his heirs and assigns, forever, the island in the Detroit river known as "Fighting Island," as shewn on a plan of record in the Crown Lands Department, and described, by the surveyor who made the plan, as lying between two lines extending from a point on the north nearly opposite Turkey creek to a point on the south nearly opposite the mouth of the Rivière aux Canards—the line forming the easterly boundary following the westerly side of the Canadian channel along its windings, and the line forming the westerly boundary following similarly the easterly side of the American channel. On the plan referred to, the island was marked as containing 90.9 acres. The plan also indicated a marsh surrounding the island proper; the total area of marsh and island shewn on the plan being 1,350 or 1,400 acres:—

*Held*, that the description was not plain and unambiguous in its terms, but contradictory: the grant purported to be of an island shewn on a plan, but, by the reference to physical features, much more than the



island shewn on the plan was described; and, therefore, the correspondence leading up to the grant and the circumstances attending the grant were admissible in evidence to prove what was in fact the subject of the sale—not to alter the contract, but to identify its subject; any expression involving repugnancy to or inconsistency with the rest of the instrument might be modified to the extent of removing that repugnancy or inconsistency; and loose and general words in the description yielded to particular and specific words therein.

*Gordon-Cumming v. Houldsworth*, [1910] A.C. 537, 541, and *Grey v. Pearson* (1857), 6 H.L.C. 61, 106, followed.

And *held*, upon the evidence, that the area granted by the patent was not merely the 90.9 acres called on the plan "Fighting Island," but a much larger area, including that island as shewn on the plan, and at least the marshes surrounding it.

*Held*, also, that the word "channel" was used in the description to designate the deeper parts of the Detroit river most convenient as tracks for shipping; that there were two such channels, one on each side of the island; and that there was no difference in meaning between "bank of a channel" and "side of a channel," or between "channel-bank" and "channel-side," when used to define a boundary in the same locality.

*Held*, also, that the description in the grant to P. included the land covered by water in possession of the defendant G. under a license of occupation from the Provincial Government, used by G. as a fishery, and claimed by the plaintiff as the successor in title of P.

*Held*, also, that, in obtaining the license, G. perpetrated a deliberate fraud, by gross misrepresentation and the suppression of material facts.

*Held*, also, that the statute regarding presumptions in grants from the Crown, 1 Geo. V. ch. 5, did not assist G.; for the grant to P. was not a matter of presumption, but of fact, supported by the attending circumstances; and, even if the Crown had not granted to P. the island as far as the channel-bank, the license to G. should, on other grounds, be set aside.

*Held*, therefore, following *Martyn v. Kennedy* (1853), 4 Gr. 61, and *Flurence Mining Co. v. Cobalt Lake Mining Co.* (1909), 18 O.L.R. 275, that, though the Attorney-General was not a party to the action, G.'s license of occupation, having been procured by fraud, should be declared cancelled and void.

THE plaintiff, the administrator in Ontario of the estate of the late Francis F. Palms, of Detroit, Michigan, who died on or about the 4th March, 1905, brought this action against the original defendants to recover from them certain property situate in the Detroit river, into possession of which they had entered about the month of April, 1907, under a contract of sale and purchase made between their predecessor in title, one Behen, as purchaser, and the heirs of the said Palms, as vendors.

The original defendants declared that they were ready and willing to carry out the terms of the contract; but they alleged that, owing to a grant to one Gauthier by the Province of Ontario of part of the property, which they understood to be included in the agreement, and the entry into possession of the same by Gauthier, the plaintiff was unable to make a good title.

The action came on for trial at Sandwich in March, 1912, be-

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fore FALCONBRIDGE, C.J.K.B., who directed that the case should stand over for trial until notice of the proceedings should be served on the Attorney-General for the Province of Ontario, and that Gauthier should be added as a party defendant.

Notice was duly given to the Attorney-General, and Gauthier was added as directed. Amendments were made to the original statement of claim, alleging that, in derogation of the plaintiff's title to the lands in question, the Crown—represented by the Minister of Lands Forests and Mines of Ontario—had assumed, in the year 1909, to grant to the defendant Gauthier a license of occupation of certain lands covered by water which were included in the prior grant; and that Gauthier had entered into and was in possession of such lands.

As against the original defendants, the plaintiff claimed possession and mesne profits; and, as against Gauthier, a declaration that his license of occupation was issued in derogation of the plaintiff's title, and should be cancelled. An injunction was also asked for to restrain the defendant Gauthier from further entering upon the property in dispute.

December 3, 1912. The action was tried before LATCHFORD, J., without a jury, at Sandwich.

*E. D. Armour*, K.C., and *A. R. Bartlet*, for the plaintiff.

*J. H. Rodd*, for the defendants Delaney, Ritchie, and Glukoff.

*McGregor Young*, K.C., and *H. C. Clay*, for the defendant Gauthier.

The Attorney-General was not represented.

January 10, 1913. LATCHFORD, J. (after stating the facts as above):—It was stated that the fisheries carried on by Gauthier upon the property have an annual value of many thousand dollars. Owing to the importance of the interests involved, and the possibility that a higher Court might take a different view from that which I entertained as to the issues to be determined, the evidence was allowed to cover a wider field than I was inclined to think necessary. My opinion was, and is, that the main question for determination, if not indeed the only question, is, whether or not the description in the letters patent from the Crown to the plaintiff's predecessors in title includes the land

covered by water now in possession of Gauthier under his license of occupation.

If the description were clear and unambiguous in its terms, the purpose for which the property was originally obtained from the Crown could not be shewn by the correspondence which led up to the grant. Such is, as I understand it, one of the two principles of the decision in *Attorney-General of Quebec v. Fraser* (1906), 37 S.C.R. 577, and, *sub nom. Wyatt v. Attorney-General of Quebec*, [1911] A.C. 489. The question of navigability, also there dealt with, is not in issue here. But all that passed is admissible to prove what was in fact the subject of the sale; not to alter the contract, but to identify its subject: *Gordon-Cumming v. Houldsworth*, [1910] A.C. 537, at p. 541.

The description in this case is far from plain. It appears to be contradictory. Some of its terms are certainly ambiguous. It purports to grant an island according to a plan, and by reference to physical features grants much more than the island shewn on the plan. In it the word "channel" is used to signify the easterly and westerly boundary of the property granted. "Channel" is a word of many meanings. As used in the description, what meaning is it intended to convey? Obviously, only such as will be reconcilable with the other terms of the description. Any meaning involving repugnance to or inconsistency with the rest of the instrument may be modified to the extent of removing that repugnancy or inconsistency: *Grey v. Pearson* (1857), 6 H.L.C. 61, 106.

Some light may also be thrown upon the matter by a consideration of the circumstances attending the grant of the patent.

During the early part of last century, Fighting Island, otherwise known as Grosse Isle aux Dindes, was occupied by the Wyandotte Indians, a branch of the once powerful Hurons. Near by, on the Rivière aux Canards, was shed the first blood of the war of 1812. Since then, the Indian and the wild turkey have alike vanished, but the island still worthily perpetuates one of its ancient names.

In 1827, Thomas Paxton presented a petition to His Majesty, setting forth that he is the second eldest son of Captain Thomas

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Paxton, who had most faithfully and honourably served His Majesty's late father, of glorious memory, for a period of thirty-five years, in various parts of the world, and was lost in 1804, with His Majesty's schooner the "Speedy," belonging to what was then called the Provincial Navy, on Lake Ontario. The petitioner states that his father was peremptorily commanded by the then Governor of this Province, General Hunter, to embark with the Judge and officers of the Court going on the circuit to open the assizes in the district of Newcastle; that, owing to the utter unseaworthiness of the vessel, he protested, but unavailingly; and that from the time of leaving the port of York no tidings were ever heard of the schooner.

Mr. Paxton added that nothing was ever heard of the passengers; who included a prisoner to be tried for murder, his counsel, and the witnesses, as well as Mr. Justice Cochrane, Solicitor-General Gray, Sheriff McDonell, and other Court officials.

The petitioner sets forth the helpless circumstances in which his mother and family were left, his own services during the late war with the United States, and that he had never received any lands of the Province, either for his personal services or as the son of a person who met his death in the employment of the Government. He then states that he has lately obtained from His Excellency Sir Peregrine Maitland a license to occupy an island in the Detroit river called Grosse or Fighting Island, which, upon the recent survey under the Treaty of Ghent, fell within His Majesty's Dominions. The island, he says, contains about twelve hundred acres of low, flat marsh land, wholly unfit for cultivation or fortifications, but which would, "if possessed by your petitioner, be of great value for various purposes." He, therefore, asks a grant of the island for a fair consideration.

The petition was favourably entertained; and on the 30th September, 1827, a license of occupation issued to Thomas Paxton, gentleman, for the island, "containing by computation about twelve hundred acres."

How Paxton availed himself of the license of occupation may be gathered from the memorial presented thirty years later to His Excellency General Sir William Eyre by the Honourable John Prince. After referring to the services of Mr. Paxton and



his father, to the loyalty of the family, and to the fact that they have never been blessed with an abundance of this world's goods, the memorial proceeds: "The main dependence of Mr. Paxton for the support of himself and his family is this island, because of the fishery attached to it. For years after the license was granted to him, the island was entirely useless to him; but he afterwards, by the assistance of friends, obtained the means of clearing the river from rocks and boulders, and removing the many impediments which existed to the establishment of a fishery. To effect that, many years of labour and much money were expended, and he was at length induced to embark all he had in the enterprise; and it is only within the last few years that he has been at all remunerated. He has erected houses, curing sheds, and other buildings there, and in fact has embarked there all he has in the world."

Colonel Prince then asks that Mr. Paxton be allowed to hold the island for his life or be permitted to purchase it at a fair valuation and on a long credit.

The Superintendent-General of Indian Affairs was not disposed to entertain favourably this application made on behalf of Mr. Paxton. Under date of the 8th August, 1857, he reports that he thought Mr. Paxton guilty of bad faith in suppressing the mention of his license of occupation until he found other ground failing him; and that, having further regard, *inter alia*, "to the long time which he (Paxton) has enjoyed a most valuable fishing at a nominal rent," he considered that Paxton should be satisfied if he had the pre-emptive right to purchase "at a valuation based on the present state of the island, including improvements. . . . If on these conditions he declines to accept the pre-emption, the island and fishery might be sold by auction for the benefit of the Indians."

On the 8th December, 1857, Mr. Froome Talfourd—who succeeded Mr. Pennefather as Superintendent of Indian Affairs—wrote to Colonel Prince informing him that the Executive Council had recommended "that the island be sold to Mr. Paxton at its present value (irrespective of his improvements thereon), but subject to his obligation under the lease and certain bonds" which he appears to have executed, apparently securing some

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An arbitration to determine the value of the island was subsequently had; and in 1858 the price was fixed at £1,500, payable in five equal annual instalments.

The title to the island was, however, still in the Indians. On the 23rd March, 1863, an order in council was passed accepting a surrender executed on the 27th February, 1863, by the Wyandotte Indians of Anderdon, conveying to the Crown this island, "with all the appurtenances thereunto belonging in trust to sell and convey the same for the benefit of the said Indians."

Paxton appears to have paid the purchase-money for the island prior to the 28th June, 1867, when a patent issued to him under the Great Seal of Canada. The patent expressed that, in consideration of the sum of \$6,000 by Thomas Paxton paid to the Superintendent of Indian Affairs, Her Majesty has granted to him, his heirs and assigns, forever, all that parcel or tract of land situate, lying, and being in the county of Essex, of "Our said Province," which said parcel or tract of land may be otherwise known as follows, that is to say: being composed of the island in the river Detroit known as "Fighting Island," as shewn on a plan of survey by Provincial Land Surveyor O. Bartley, dated the 20th August, 1858, of record in the Crown Lands Department, and which is described as follows by the said O. Bartley, that is to say: commencing at the upper or northerly end of the said island, north-westerly of and nearly opposite to Turkey creek, in the Petite Côte, in the township of Sandwich, in the said county of Essex; thence southerly with the stream along the westerly side of the channel of the Detroit river known as the "British channel." and following the windings thereof to the lower or southerly end of the said island nearly opposite the mouth of the river (*sic*) aux Canards, in the township of Anderdon; thence northerly against the stream along the easterly side of the channel of the said river known as the "American channel," and following the windings thereof, to the place of beginning: reserving free access to the shore of said island for all vessels, boats, and persons. "To have and to hold the said parcel or tract of land hereby granted, conveyed, and assured un-

to the said Thomas Paxton, his heirs and assigns, forever; saving, excepting, and reserving, nevertheless, unto Us, Our Heirs and Successors, the free use, passage, and enjoyment of, in, over, and upon all navigable waters that shall or may be hereafter found on or under or be flowing through or upon any part of the said parcel or tract of land hereby granted as aforesaid."

The grant is of "all that parcel of land . . . otherwise known as . . . the island in the river Detroit known as Fighting Island . . . as shewn on a plan . . . and described," by the surveyor, as lying between two lines extending from a point on the north nearly opposite Turkey creek to a point on the south nearly opposite the mouth of the Rivière aux Canards—the line forming the easterly boundary following the westerly side of the Canadian channel along its windings, and the line forming the westerly boundary following similarly the easterly side of the American channel.

A copy of Bartley's plan has been produced from the Department of Indian Affairs at Ottawa. The legend is: "Plan of Fighting Island, Detroit River, with the Adjacent Marshes." It does not purport to be drawn to any scale.

Turkey creek and the Rivière aux Canards are not shewn on Bartley's plan; but the relation of each to the island and marshes has been established by the evidence of Mr. Newman.

On the north-easterly portion of the plan, a relatively small, wedge-shaped area is shewn, marked "Fighting Island or Isle aux Dindes, 90.9365 acres." The marsh, indicated by conventional signs, almost surrounds the island proper, and extends down the river a further distance of five miles or more, when its southerly extremity ends, not in a point, but in a line bearing east and west. The total area of marsh and island shewn on Bartley's plan is 1,350 or 1,400 acres.

The water in the Detroit river varies in level about three feet; and the area of island and marsh is diminished when the water is high and increased when it is low. At places there is no marked line between land and water. The marsh grasses and weeds extend far into the river in certain localities, especially at the lower end of the island, where the reeds come up through the water for nearly a mile south of what may properly be called land.

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There is not a defined shore-line to the island and marsh, taken together, as they are shewn on Bartley's plan. In fact, the plan indicates that towards the north no definite line could be drawn between land and water.

The points of the extended description at the north and south are fixed in the description by reference to physical features on the mainland which cannot have changed materially since the grant was made. There can be no doubt that Turkey creek and the Canards river still discharge into the Detroit river in the same localities as in 1858. These streams at their mouths are approximately six miles apart.

The "nearly opposite" north and south points of the area granted to Paxton are necessarily separated by nearly the same distance.

Loose and general words in a description yield to particular and specific words in the same description. I, therefore, find that the area granted by the patent is not merely the 90.9 acres called on the plan "Fighting Island," but a very much greater area, including Fighting Island as shewn on the plan, and at least the marshes surrounding it, though they form according to the plan no part of Fighting Island.

Upon the plan itself Bartley expressly distinguishes the island from the adjacent marshes. His description manifestly covers much more than the island as shewn on his plan. Even the inclusion, in addition, of the marshes indicated, does not satisfy the description.

This clearly appears when the physical features of the island are considered, and the relation to it of the streams on the mainland, "nearly opposite" to which lie the northerly and southerly points respectively of what was granted by the Crown in 1867.

From what is ordinarily above water, shelving beaches extend out on both sides, a varying distance, to what is known as the "channel-bank" of the river. The beach on the east side of the island is very narrow: from sixty to a hundred feet. On the west side, the beach is as wide in places as 2,500 or 3,000 feet; and where it is wide it forms one of the greatest spawning beds known of the true white-fish.



The point of departure of the line enclosing the area granted cannot be exactly determined from the description or plan, or from the physical features of the locality as they exist to-day.

The island itself has doubtless greatly changed. It has been subject for more than fifty winters, especially at the north end, to the erosive action of the ice swept down the stream; while, summer and winter, the powerful currents of the great river have attacked the sandy and marshy shores. The broad "fish-tail" at the lower end of the marsh, as outlined by Bartley, has been cut away. A point described in 1858 as "at the upper or northerly end of the said island north-westerly of and nearly opposite Turkey creek" must be a distance—how little or how great it is impossible to state with accuracy—above the present head of the dry land.

The terms "at," "nearly opposite to," and "north-westerly of," are loose and indefinite expressions. Having regard, however, to all three, and to the evidence of the present physical condition in the vicinity, I can reach no other conclusion than that the northerly point in the description, where the enclosing lines of the area granted begin and end, is now—if indeed it was not in 1858—under the water of the Detroit river. A point opposite Turkey creek might be on the island itself; but "opposite" in the grant is qualified by "nearly;" and a point "north-westerly of Turkey creek" would necessarily be above the head of the island.

The "lower or southerly end of the said island nearly opposite the mouth of the river aux Canards" is quite clearly not the lower or southerly end of "Fighting Island or Isle aux Dindes," as shewn on Bartley's plan. If the scale of the plan is one inch to 400 feet, as conjectured by the official who produced it, the southerly end of the island proper, as distinguished from the marshes, is nearly six miles north of the mouth of the Canards. If, as I think, the scale is in fact a little greater, the distance would be at least five miles. The "lower or southerly end of the said island," mentioned in the description as nearly opposite the small river on the Canadian shore, is not the southerly end of the area of less than a hundred acres, but of a much

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greater area, ending at the south nearly opposite the mouth of the Rivière aux Canards.

The plan shews a broad end to the marshes on the south. The description, if intended to follow what was outlined on the plan, would at the south take a bearing westerly a distance of one-third to one-half a mile. Instead of this, the bearing "southerly with the stream" is reversed to a bearing "northerly against the stream." I am quite unable to see how this requirement of the description can possibly coincide with the southerly outline of the marsh as shewn by the same hand that drew the description. Having regard to conditions at the lower end of the island, I am satisfied that no plan could or can accurately represent the changeful boundary between land and water at the southerly end of the property granted to Paxton. Newman's plan—the most accurate filed—and his evidence fully warrant this conclusion.

There is, however, a point, "nearly opposite the mouth of Rivière aux Canards," which satisfies the other controlling terms of Bartley's description. At that point, a bearing southerly may be directly reversed to a bearing northerly. At it, also, the line following the westerly side of the Canadian channel, along the easterly side of the island and marsh, meets a line following the easterly side of the American channel along the westerly shore of the island and marsh. It is to be noted that none of the terms—"shore," "shore-line," "water's edge," "high water mark," "low water mark"—so common in surveyors' descriptions of the time—is used by Bartley. It would have been improper for him to apply any such word as a limit to property not in fact so bounded. But here again, as at the northerly and southerly points, he made the description as definite as it could be made, by reference to physical features of the island but little subject to change—the channels of the river Detroit. These separate at the head of the island: the point where the description begins and ends. Their sides form the limits to the east and to the west of the property granted to Paxton; and the point where the west side of one channel meets the east side of the other conforms to another dominant call or requirement of the description.

“Channel,” as applied to a river, may mean the place or bed in which the river flows. That is perhaps its primary meaning: Murray’s Dictionary; *Dunleith and Dubuque Bridge Co. v. Dubuque County* (1881), 55 Iowa 558. Where the word has that meaning, the side or bank of the channel is, of course, identical with the side or bank of the stream. But, as is pointed out in the case cited, the primary signification may be controlled by the circumstances.

The Imperial Dictionary, while stating the usual meaning to be “the place where the river flows,” adds, “more appropriately the deeper part or hollow in which the principal current flows.” To a like effect is the definition of the Century Dictionary.

As the word was, no doubt, first applied to the Detroit river by the French explorers and voyageurs, or by the French settlers who followed their adventurous courses, the meaning of the word in their language may not be unworthy of a reference. Littré, whose authority is pre-eminent, defines “*chénal*” as primarily meaning, “*Passage pratiqué dans une rivière ou à l’entrée d’un port.*”

I think “channel” is used in the description in this case to designate the deeper parts of the Detroit river most convenient as a track for shipping. Mr. Molliter, a Michigan engineer, called on behalf of the defendant Gauthier, so understood the word as applied to the Detroit. Such a channel exists on both sides of the island. It has well-defined and fairly permanent banks. In fact, “channel-bank” is a term that has long been used as a designation of boundary in the Detroit river. It was so used in the conveyance of the 13th January, 1883, to one Charles H. Gauthier, mentioned in *Barthel v. Scotten* (1895), 24 S.C.R. 367, 369. This property in question in that case is about a mile above the upper end of Fighting Island. The channel-bank of the Detroit river is there stated to be distant from the water’s edge “six hundred feet more or less.”

“Channel-bank” is a term also used in the license of occupation issued to the defendant Gauthier—who may or may not be the person of the same name referred to in *Barthel v. Scotten*. Each of the lots covered by Gauthier’s license of occupation is “west of Fighting Island;” and the westerly boundary of each

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lot is "the channel bank of the Detroit river . . . following the windings of the said channel bank."

The westerly boundary of Paxton's grant is, as has been stated, "the easterly side of the channel of the said river, known as the American channel, and following the windings thereof."

I am unable to distinguish between "channel-bank"—that is, bank of the channel—in the license of occupation, and "side of the channel"—that is, channel-side—in the patent. In my opinion, there is no difference in meaning between bank of a channel and side of a channel, or between channel-bank and channel-side, when used to define a boundary in the same locality.

When the identity of the words "side of the channel" and "channel bank" is made plain, the description in the patent becomes clear and consistent. The point of origin and completion is where the channel bank on one side of Fighting Island begins to diverge from the channel bank on the other side. Such a point is at "the upper or northerly end of said island, north-westerly of and nearly opposite to Turkey creek, in the Petite Côte" of Sandwich. The channel-banks on each side of the island continue "to the lower or southerly end of the said island nearly opposite the mouth of the Rivière aux Canards." The area thus enclosed corresponds in length to the distance called for by the physical features on the main shore. It is wider, in fact, than the plan indicates the island to be; but there is no limitation of area in the grant. A limitation which did exist was deleted, and bears opposite to it in the margin of the parchment the initials of the Assistant Commissioner of Crown Lands. On the east, the side of the channel almost coincides with the line of the plan indicating the east side of the island and marshes. On the west, as stated, the side of the channel is farther out from the line of the marshes—the distance varying from 200 feet to nearly 3,000 feet.

The purpose for which the grant was sought could not be effective unless Paxton's rights extended to the channel-bank. It was on the beaches between the channels and the island and marshes that he had made the improvements mentioned in Colonel Prince's memorial—"clearing the river of rocks and



boulders, and removing other impediments to the establishment of a fishery."

The report to Council of Commissioner Pennefether (8th August, 1857) refers to "the long time" that Paxton has "enjoyed a most valuable fishery at a nominal rent," and suggests that, if Paxton is not willing to purchase at a valuation based "on the present state of the island, including improvements . . . the island and the fishery might be sold for the benefit of the Indians." The "improvements" are obviously those mentioned in the application to purchase on which the Superintendent was reporting.

There is in evidence an order in council (Dominion) which may be of value as shewing what was contemporaneously understood to be the meaning of the grant. It bears date the 5th December, 1870, or but little more than three years after the date of the grant itself. Trouble had arisen between Paxton and the fishery inspector for the district; and Paxton had paid under protest \$200, not, as he stated, as rent, but, I think, as a license fee. He petitioned the Minister of Marine and Fisheries for a refund, and the Minister of Justice was asked for a report, which is embodied in the order in council. So far as material, the report is as follows:—

"It is evident that the original occupancy of the island in 1827 under license of the Lieutenant-Governor was with a view to its advantages as a fishery; that the award as to the value of the island was based on the fishery; that, in effect, Paxton has paid a capitalised rent for the acquisition of the fishery, and that the Wyandottes confirmed that sale by the Crown when surrendering the same.

"It would, therefore, be most harsh and unjust to compel Paxton to pay again yearly for that which in one sum the Crown purported to sell him forever."

After pointing out that the Fisheries Act, 31 Vict. ch. 60, sec. 2, does not render it imperative to issue fishing licenses, but is merely permissive, the Minister of Justice concludes: "I am of opinion that Paxton should be permitted to remain unmolested in possession of the fishing rights exercised by him for the last 48 years." A license to Paxton was, therefore, regarded as

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“unnecessary and improper,” and a refund was ordered of the \$200.

Paxton died in 1874, devising the island to his son Ethelbert B. Paxton for life; remainder to the heirs of the body of his son.

The defendant Gauthier recognised, in several leases which he executed, the right of Paxton's devisees to the fisheries, including the pier lying between the island proper and the easterly side of the American channel.

By agreement under seal, dated the 20th August, 1877, Ethelbert B. Paxton leased to Gauthier, for a term of eleven years, “the fishery on the west side of Fighting Island that has been used by Noel Joli for the three years just past and below the one now occupied by the said Gauthier.” Gauthier, on his part, covenanted to render to Paxton one-fourth of the fish caught or marketed, as the lessor might prefer.

The location of the pier of the Joli (or Paré) fishery was near the head of the island and marshes, and about halfway between the indicated westerly shore line and the channel-bank.

Nearer the upper end of the island was the pier called the Coté or Dufort fishery. This had previously been leased by Mrs. Paxton to Gauthier. Its location was about 360 feet out from the marsh. Farther down, between the marsh and the channel bank, were the piers used in connection with what were known as the Girard and the Clark fisheries. For these, as well as for the Joli fishery, the defendant Gauthier was for many years under obligation to pay a rental.

An adjustment was made on the 19th November, 1881, before the lease of the Joli fishery expired, by which all four fisheries were leased to Gauthier by Ethelbert B. Paxton. A right was given Gauthier to establish a new fishery below the Clark fishery; Paxton demising and leasing to Gauthier “a sufficient portion of land and land covered with water to erect, put up, and work said fishery.” The lease covered a term expiring on the 1st May, 1889. For arrears under one of the prior leases referred to in the recitals, and as rent to the 1st January, 1886, Gauthier covenanted to pay, and no doubt did pay, upon the execution of

the lease, a lump sum of \$3,600. For the next three years the rent payable and paid was \$900 a year.

Gauthier says that he went out of possession after the leases expired; and, as there is not the slightest evidence to the contrary, his statement must be accepted.

The leases, therefore, do not operate by way of estoppel. It is now open to Gauthier, as a matter of law, to deny the title which he at one time accepted. But the documents which he executed are not, I think, without a significance when there is question of the true construction of a loose and latently ambiguous description.

Before the expiry of the lease on the 7th November, 1888, the interest of Ethelbert B. Paxton was transferred to his wife Felice; who, on the 11th February, 1892, in consideration of \$100,000, conveyed the island, as described in the patent, to E. H. Gillman and others; taking a mortgage back securing payment of the purchase-money. After a number of mesne conveyances, a final order of foreclosure, which became absolute on the 6th July, 1903, again vested the title to the island in Felice Paxton. From her Mr. Palms, one of the mortgagors foreclosed, purchased it, two weeks later, for \$88,361.17—approximately, if not exactly, the amount due to her under the judgment, with interest and costs.

What happened to the fisheries between the expiry of the lease to Gauthier in 1889 and the purchase by Palms in 1903, is in evidence only from Gauthier. He says that the Dominion Government operated the fisheries from 1892 to 1902. It does not appear whether compensation was made or not, to the several owners during this period. Gauthier says that he began fishing again at the Clark pier in 1903. He paid no rent, and was asked for none. Subsequently he operated the other fisheries or some of them.

In May, 1904, while Gauthier, without colour of right, was operating the Clark and other fisheries purchased by Palms from Mrs. Paxton, the Canadian solicitors for Palms applied to the Commissioner of Crown Lands for Ontario for a patent for the water lot surrounding the island; stating that the water lot was not included in the patent. If my view is right, they were

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mistaken. In reply, the Department asked for the area. The solicitors answered that they had nothing but a map made by the War Department of the United States, and suggested as bounds of a description "the channel-bank and water's edge, following the course of the water's edge and the channel-bank." To this the Department replied declining to accept the plan referred to, and insisting on compliance with the usual conditions: a special plan in triplicate; a description by metes and bounds, made by a surveyor; an abstract of title to the island; and a declaration by the owner verifying ownership, shewing no adverse claim, and stating the purpose for which the grant was desired.

There is no evidence as to what happened in the interval between the date of the letter and issue, on the 15th February, of the license of occupation to Gauthier, except his testimony that he continued as from 1903 to operate the fisheries, and what may be gathered from the letter of the Minister of Crown Lands of the 3rd November, 1909, to Mr. Hanna, K.C., of Windsor, who on behalf of the Palms estate had asked for the cancellation of Gauthier's license of occupation—a right expressly reserved by the Crown.

What does appear beyond question is, that Gauthier was not required to comply with the conditions prescribed to Palms in 1904. No plan except the rejected plan was furnished, no survey, no surveyor's description.

From the Minister's letter it is clear, not only that material facts were suppressed, but that there was gross misrepresentation by Gauthier, who did not disclose that he had rented the pier fisheries as well as the shore from the owners of the island, nor that the fisheries on the front of the island, which he claimed to have "built and established as long ago as 1873 or 1876 or thereabouts," were the fisheries he had leased from the Paxtons. He falsely pretended "that his lease"—only one is mentioned by the Minister, when in fact there were several—"did not cover the water front or the fisheries in any way, but only the shore." He did not inform the Minister that—as he swore at the trial—it was the Dominion Government, and not himself, that operated the fisheries from 1892 to 1902, or for fully one-



half of the time he professed to have been in undisturbed occupation of them. He gave to the Palms estate no notice of his application, and is unaware that the estate had any knowledge of it. I have no hesitation in finding that, in obtaining the license, Gauthier perpetrated a deliberate fraud.

That there was knowledge on the part of the Crown of an adverse claim, and some doubt as to the right to issue a license, is manifest from the provision "that the licensee, his heirs . . . shall have no recourse against the Province of Ontario for any loss or damage that may be sustained by reason of any adverse claim of the Government of Canada or any other party or parties or corporation whatsoever."

The recent statute regarding presumptions in grants from the Crown, 1 Geo. V. ch. 5, does not, in my opinion, assist Gauthier. The grant to Paxton, as I interpret it, is not a matter of presumption, but of fact, supported by the attending circumstances. Even if the Crown had not granted to Thomas Paxton the island as far as the channel-bank, the license of occupation to Gauthier should, on other grounds, be set aside.

The advantage to the Province—\$50 a year—is trivial as compared with the wrong to the real owners of the fisheries, even though their rights did not extend to the channel-bank. As I have already mentioned, a Minister of Justice, reporting to His Excellency in 1870, regarded it "as most harsh and unjust to compel Paxton to pay again yearly for that which in one sum the Crown purported to sell him forever." It is obviously still more unjust that, by reason of Gauthier's license, obtained by fraud and misrepresentation, the grantees of Paxton should be deprived of the chief element of value in the property for which they have agreed to pay \$125,000.

Following the long line of decisions referred to in *Martyn v. Kennedy* (1853), 4 Gr. 61, and continued to *Florence Mining Co. v. Cobalt Lake Mining Co.* (1909), 18 O.L.R. 275, determining that, though the Attorney-General is not a party to the suit, a grant made by the Crown through error or improvidence, or procured by fraud, may be set aside, I consider that the prayer of the plaintiff as against Gauthier should be granted, and Gauthier's license of occupation declared cancelled and void.

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An injunction should issue against Gauthier's further interference with the fisheries and lands of the plaintiff. I also direct a reference to the Master at Sandwich to determine the damages.

As between the original parties, the plaintiff is entitled to possession of the property conveyed; to mesne profits, as to which there will be a reference; and to costs up to the time Gauthier was added as a party. Costs subsequently—other than of the references, which I reserve—with costs of trial, are to be paid by Gauthier.

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[IN THE COURT OF APPEAL.]

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## CITY OF TORONTO V. FOSS.

*Municipal Corporations—Prevention of Use of Buildings as "Stores" or "Manufactories"—Municipal Act, 1903, sec. 541a—By-law — Ladies' Tailoring Business.*

The decision of a Divisional Court, *ante* 264, was affirmed, on appeal by the plaintiffs to the Court of Appeal.

APPEAL by the plaintiffs from the judgment of a Divisional Court, *ante* 264, reversing the judgment of MIDDLETON, J., and holding that a building in Avenue road, in the city of Toronto, occupied by the defendant and used as his dwelling-house and also for the purposes of a ladies' tailoring business, was not a "manufactory" or a "store," within the meaning of a by-law of the plaintiffs, passed pursuant to sec. 541a of the Municipal Act, 1903, as enacted by 4 Edw. VII. ch. 22, sec. 19.

December 3, 1912. The appeal was heard by GARROW, MACLAREN, MEREDITH, MAGEE, and HODGINS, J.J.A.

*G. R. Geary*, K.C., for the plaintiffs, argued that they were authorised by statute to pass by-laws to prevent the erection and use of buildings as stores or manufactories, and that the evidence shewed that the business carried on by the defendant at the building in question was that of a store or manufactory, within the recognised meaning of these terms: *Wilkinson v. Rogers* (1864), 2 De G. J. & S. 62.

*Grayson Smith*, for the defendant, relied on the cases and arguments in the judgments of the majority of the Judges in the Court below, and in the argument, *ante* p. 266, referring especially to *The State v. Canney* (1848), 19 N.H. 135.

*Geary*, in reply.

January 15, 1913. The judgment of the Court was delivered by MEREDITH, J.A.:—The onus of proving that the defendant carries on a business in violation of the provisions of the by-law is upon the plaintiffs; and I cannot think that they have proved it. It is quite plain that neither the by-law, nor the legislation upon which it is founded, was intended to be applicable to all kinds of work or trading; neither comprises shops of all kinds, nor businesses of all kinds. If the legislation had been meant to be as comprehensive as the plaintiffs contend for, it should, and doubtless would, have been embodied in very different language.

No doubt, the purpose of the legislation was to prevent a residential street being turned into a business street; to preserve its residential character; all of which, however, can be done, as the legislation itself indicates, without decreeing that no trade or business of any kind shall be done in any house or building upon it.

If the defendant's house could, in any sense, be deemed a shop or a store, its better description would, I have no doubt, be a shop, because it is unquestionably used to some extent as a workshop; but as a shop it is not within the by-law or the legislation; it can be brought, if at all, within them only as a manufactory or a store; and I am unable to consider that this dwelling-house has been proved to be either.

I cannot think that in ordinary conversation it would ever be described as either a factory or a store; and these words are to be given their ordinary meaning. In the ordinary use of the word "manufactory" much more in the nature of a work-shop is meant than merely a room where a very few persons ply their needles in making women's clothing. So, too, of the word "store;" when one carries on in his or her own home, even with the assistance of a very few seamstresses, the business of dress-making, a thing which is quite common, I cannot think that any

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making, a thing which is quite common, I cannot think that any one would ordinarily call that house a "store," even though he or she might sometimes sell material to be used in making the dresses there, or even sell an already made garment occasionally. The by-law and legislation relate to the "erection and use of buildings," but the building in question carries none of the outward and visible signs of a store, nor is the business carried on within it such as, in my opinion, makes the defendant a store-keeper, within the meaning which, I think, would commonly, and therefore should, be attached to the word "store" as used in the legislation in question. At the most, it would, I think, be said that he used his house as a ladies' tailor shop; and the by-law prohibits only "butcher shops" not barber shops, blacksmith shops—unless manufactories—nor even "gin-shops."

It may be that the common use of the word "store," instead of "shop," by the English-speaking people of this continent, arose out of the "country store" known to all in the earlier days, and to most of us now; a place of trading which was—to meet the needs of the community—a veritable storehouse of the "needle to anchor" character in all trades in a very small way; and so there arose a need to distinguish them from the shops of the mother country, in which it was the custom of the shop-keeper to stick closely to his own trade only; a need which in later days has seemed to call for the use of the word "stores" instead of "shops" in naming the greater "needle to anchor," in all trades, institutions, which have, in these later days, become quite common there.

I would dismiss the appeal.

*Appeal dismissed with costs.*

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## [IN THE COURT OF APPEAL.]

REX V. MITCHELL.

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*Criminal Law—Perjury—Tribunal before which Offence Committed—Registrar under Manhood Suffrage Registration Act—Irregularity of Appointment—Tribunal de Facto—“Judicial Proceeding” — Criminal Code, sec. 171.*

The regularity and legality of the appointment of M. to act as a Registrar under the provisions of the Manhood Suffrage Registration Act, 7 Edw. VII. ch. 5, being disputed:—

*Held*, nevertheless, that he was *de facto* a Registrar; that the proceedings before him were “judicial proceedings,” within the meaning of sec. 171 of the Criminal Code; and that the defendants might properly be convicted of perjury in respect of oaths taken before him in those proceedings.

*Drew v. The King* (1903), 33 S.C.R. 228, followed.

THE defendants were tried in the County Court Judge’s Criminal Court for the County of Kent, on charges of perjury said to have been committed before one W. G. Merritt, acting as Registrar under the Manhood Suffrage Act, 7 Edw. VII. ch. 5 (O.), for the Dominion election of 1911.

The Judge presiding in the Criminal Court, DOWLING, Jun. Co.C.J., found the defendants “not guilty;” adding that, if the Crown’s contention as to the law were correct, he would find them “guilty.”

The ground upon which the finding was made in favour of the defendants was, that W. G. Merritt was not properly appointed a Registrar under the Act, and that the registration proceedings taken by and before him were invalid.

The learned Judge submitted the following questions for the opinion of the Court of Appeal:—

1. Were the actions of Judge Bell and those whom he purported to appoint Registrars, as set out in the evidence, legal and sufficient to constitute a Board of Registrars under the provisions of the Manhood Suffrage Registration Act, 1907, 7 Edw. VII. ch. 5?

2. Was W. G. Merritt a duly appointed Registrar under the provisions of the said Act?

3. If the said W. G. Merritt was a duly appointed Registrar under the provisions of the said Act, in the absence of the proceedings provided for by sec. 10 of the said Act, was he a

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person authorised by law to administer the oath to the defendants?

4. Were the proceedings before the said W. G. Merritt, as said Registrar, "judicial proceedings," as defined by sec. 171 of the Criminal Code of Canada?

5. If the above questions, or any of them, are answered in the affirmative, then upon the findings of fact of the trial Judge, were the defendants guilty of the offence of perjury under the Criminal Code?

November 18, 1912. The case was heard by GARROW, MACLAREN, MEREDITH, MAGEE, and HODGINS, JJ.A.

*J. R. Cartwright*, K.C., for the Crown, argued that considerable latitude is allowed by the Courts in the case of persons occupying a *de facto* position such as the Registrar held in connection with the proceedings taken before him. The Board might consist of one person, as had been held with regard to a "committee," and a "meeting:" *In re Taurine Co.* (1883), 25 Ch. D. 118; *East v. Bennett Brothers Limited*, [1911] 1 Ch. 163, where *Sharp v. Dawes* (1876), 2 Q.B.D. 26, is distinguished. Reference was made to secs. 171 and 176 of the Criminal Code, and to 7 Edw. VII. ch. 5, sec. 5, sub-sec. 6.

*R. L. Brackin*, for the defendants, argued that the County Court Judge had absolutely no power whatever to act in the way he had done; and his action, being illegal from the beginning, should have been undone. He referred to the discussion of the words of sec. 171 of the Criminal Code, "whether duly constituted or not," in *Drew v. The King* (1903), 6 Can. Crim. Cas. 424, 33 S.C.R. 228; and said that this was a different case, as Merritt never became a Registrar at all. Reference was also made to secs. 7 and 12 of the Manhood Suffrage Registration Act, and to *Rex v. Rulofson* (1908), 14 Can. Crim. Cas. 253.

*Cartwright*, in reply.

January 15, 1913. MACLAREN, J.A.:—These two defendants were tried in the County Court Judge's Criminal Court for the County of Kent, on a charge of perjury committed before one W. G. Merritt, acting as Registrar under the Manhood Suffrage Act, for the Dominion election of 1911.

The learned Junior County Court Judge found them both "not guilty," on the ground of alleged irregularities in the appointment of Mr. Merritt as such Registrar; but, at the request of the prosecution, granted a reserved case and submitted five questions for the consideration of this Court, adding that, if the contention of the Crown as to the law is correct, he would, upon the facts proved, find both the accused guilty.

I am of the opinion that it is not necessary for us to answer any of the first three questions, which relate to the proceedings taken by the County Court Judge for the filling up of the vacancies caused by the absence of three members of the statutory Board of Registrars, and alleged irregularities and non-observance of the Manhood Suffrage Act.

The fourth question is as follows: "Were the proceedings before the said W. G. Merritt, as said Registrar, 'judicial proceedings,' as defined by sec. 171 of the Criminal Code of Canada?"

The "judicial proceeding" in which perjury may be committed is defined in sec. 171 as a proceeding which is held "before any person acting as a court, justice or tribunal, having power to hold such judicial proceeding, whether duly constituted or not, and whether the proceeding was duly instituted or not before such court or person so as to authorise it or him to hold the proceeding, and although such proceeding was held in a wrong place or was otherwise invalid."

The words "judicial proceeding," in the foregoing section, were interpreted by the Supreme Court in a case of *Drew v. The King*, 33 S.C.R. 228, in which a Justice of the Peace appointed for a group of counties sat in a case which, according to the provincial Act creating the offence, could be tried only by a Justice residing in the county in which the offence was committed, whereas the Justice who tried the case and administered the oath actually resided in another county of the group. It was admitted that he had no jurisdiction, and was not a tribunal *de jure*; but, because he was a tribunal *de facto*, and was exercising judicial functions, the Court held that it was a "judicial proceeding," and that the accused was rightly convicted of perjury.

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Following this decision, as we must do, the fourth question above-quoted should be answered in the affirmative; and the fifth question should be answered in the negative.

MEREDITH, J.A.:—It may be that the Chairman of the Board took too wide a view of his power, and too loose a method of procedure, in the appointment of persons to fill the places of his co-members of the Board; but, if that were so, it would by no means follow that the ruling of the trial Judge, in question here, was right; on the contrary, whatever view may be taken of the action of the Chairman, that ruling was, in my judgment, wrong.

Regularly or irregularly, rightly or wrongly, appointed, the persons who were appointed and acted as Registrars were not only in possession of the office, but in possession under colour of right, and performed all the duties pertaining to the offices, during the whole registration, without interference, and without any attempt publicly to question their rights; and so were *de facto* officers, having power to administer the oaths in question, as far as these defendants were concerned.

Beside this, under sec. 171 of the Criminal Code, relating to perjury: "Every proceeding is judicial . . . which is held . . . before . . . any person . . . authorised by law or by any statute in force for the time being to make an inquiry and take evidence therein upon oath . . . or before any person acting as a court, justice or tribunal, having power to hold such judicial proceeding, whether duly constituted or not . . . and although such proceeding was held in a wrong place or was otherwise invalid."

HODGINS, J.A.:—Under sec. 171 of the Criminal Code, perjury in a judicial proceeding may be committed if the oath is taken "before any legal tribunal by which any legal right or liability can be established, or before any person acting as a court, justice or tribunal, having power to hold such judicial proceeding, whether duly constituted or not . . . and although such proceeding . . . was otherwise invalid."

The objection taken is, that W. G. Merritt, a Registrar under the Manhood Suffrage Registration Act, 7 Edw. VII. ch. 5, was not properly appointed as such, and that the registration pro-



ceedings taken by and before him were invalid. The learned Judge, His Honour Judge Dowling, has found the following verdict as to each prisoner: "Not guilty; but, if the Crown's contention as to the law is correct, I would find the prisoner guilty."

[The learned Judge then set out the questions submitted.]

In the case of *Drew v. The King*, 33 S.C.R. 228, the charge being perjury, the Supreme Court of Canada has held that, although a Justice in hearing a charge for an offence over which he had no jurisdiction, was not a Justice having power to hold such judicial proceeding, yet that, as he was acting as a Justice having power to hold such judicial proceeding, his hearing the said charge was a judicial proceeding, within the meaning of the Criminal Code (then sec. 145, now sec. 171).

In these cases Mr. Merritt acted as Registrar under the Manhood Suffrage Registration Act, and registered the prisoners, who took their oaths before him. In view of *Drew v. The King*, and of secs. 14, 18, and 19 of 7 Edw. VII. ch. 5, I am of opinion that the proceeding in which the prisoners took the oath was a judicial one; and that Mr. Merritt would, therefore, be a person acting as a tribunal having power to hold such judicial proceeding. But, as the offence charged is a serious one, it is better that the proceedings taken should be considered. The Board of Registration under the Manhood Suffrage Registration Act is constituted by 7 Edw. VII. ch. 5, sec. 5. Its duties include the division of the electoral district into registration districts, the finding of convenient polling subdivisions, the assignment of a Registrar to each registration district, and the fixing of the time and place for holding the sittings of the court of appeal (7 Edw. VII. ch. 5, sec. 10), the fixing of the times and places for the registration sittings, and the giving of public notice thereof by posters (sec. 16), and the preparation and furnishing for the use of the Registrars of an alphabetical index-book for each polling subdivision, the forms of oaths, etc. (sec. 17). Under sec. 12, the Chairman is, after he has received notice of the dissolution or of the issue of the writ of election, to call the Board together, and the Board is forthwith to take the necessary proceedings for registration. Under sec. 14, the first of the four

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sittings for registration is to be held seven days after the date of the writ of election. The notice of dissolution was received on the 1st August, 1911, and the election in question was held on the 21st September, 1911, so that these preliminaries, the registration itself and the appeals therefrom, would have to be concluded in time to enable the voters' list to be certified, transmitted, printed, and distributed for use on the latter date.

Judge Bell appears from the evidence to have been the only member of the statutory Board within the Province until the 14th August, 1911, when Judge Dowling returned; it is so asserted, and no evidence to the contrary was produced. Mr. Scullard, the Local Master, got back to the Province on or about the 18th August; and Mr. Houston, the Police Magistrate, was absent, travelling.

Under these circumstances, Judge Bell, while recognising the difficulty of the situation decided to act under sec. 5, sub-sec. 6, which is as follows: "If there is a vacancy on the Board, or if a member is absent from the Province, or is unable to act, the other members of the Board shall appoint a fit and proper person to fill the vacancy."

Judge Bell appears to have acted in entire good faith. He says that he did not know Judge Dowling's or Mr. Scullard's address; that he asked Mr. Houston's partner to telegraph him, and was informed that Mr. Houston replied that he could not come back. Judge Bell had a communication by telegraph from the Clerk of the Crown in Chancery advising him of the dissolution of Parliament and to proceed with the registration, and a notice from Toronto to act as Chairman. I refer to these as shewing upon what he acted, though I am unable to see that in a Dominion election either would constitute him Chairman, and he only assumed that office, as he says, "pro tem." If the fact was, as he believed, that the three other members of the Board were absent from the Province, the filling of the vacancies was necessary. Judge Bell consulted Messrs. Stanworth and McCoig, the rival candidates at the election, and explained the difficulty he felt, and they both agreed with him that W. G. Merritt, the city clerk, was a fit and proper person for the position of Registrar. Judge Bell then appointed Mr. Merritt on the 2nd

August, 1911, as a member of the Board, and Mr. Merritt thereafter acted as Registrar under secs. 14, 18, and 19 of the Manhood Suffrage Registration Act.

The remaining members of the Board were then appointed. The Board thus constituted performed the duties directed by sec. 10 in fact, though there does not appear to have been any very formal proceeding in regard to the matters specified in that section. The Board adopted the registration districts formerly in use, agreed among themselves as to the district assigned to each Registrar; and there is a resolution recorded fixing the date for the sitting of the court of appeal and designating its members. I cannot see in the proceedings any suggestion of want of good faith, or any unreasonableness. I think that Mr. Merritt acted in the full belief that he was a duly qualified Registrar, and the proceedings before him were, as I have stated, in my opinion, those of a person acting as a tribunal having power to hold such judicial proceeding.

It was argued that under the Interpretation Act, 7 Edw. VII. ch. 2 (O.), the expression "the other members" may be read as including and meaning "the other member." But the application of that Act should be made only when the circumstances require it, or to avoid rendering the principal Act unworkable. See *Regina v. Justices of Cambridgeshire* (1838), 7 A. & E. 480, 491; *Conelly v. Steer* (1881), 7 Q.B.D. 520; *Re Harding* (1889), 13 P.R. 112; Interpretation Act, 7 Edw. VII. ch. 2, sec. 7, subsecs. 1, 26, 41. The Manhood Suffrage Registration Act (sec. 14) requires the first sitting for registration to be held on the seventh day after a date of the writ for holding the election. No evidence was given as to this date; but, assuming that the statute was observed, the date of the writ must have been the 16th August, 1911, as the first sitting was fixed for the 23rd August, 1911. The earliest date at which any statutory member came back was the 14th August. It is a question whether, if action had been deferred until then, there would have been time to fill the other vacancies and to enable the Board to perform the duties cast on it under the sections already mentioned. It might also be pointed out that, if only one member of the statutory Board is on hand when dissolution is announced, then, if

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none of the three absent members returns in time, or if there are in fact three vacancies in the office named in the statute, and sec. 5, sub-sec. 6, does not enable an appointment to be made, the Board cannot be properly constituted at all. But it is not, I think, necessary to decide this question. Mr. Merritt was acting *de facto* as Registrar; and, for the reason previously given, I think the proper disposition to make of the case is to answer questions 4 and 5 in the affirmative, and to leave questions 1, 2, and 3 unanswered.

GARROW and MAGEE, JJ.A., concurred.

*Judgment accordingly.*

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[IN THE COURT OF APPEAL.]

RE FORT FRANCES ASSESSMENT.

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Jan. 15.

*Assessment and Taxes—Appeal to Court of Revision—Municipality in Unorganised District—Assessment Acts and Amendments—Act respecting Municipal Institutions in Territorial Districts—Appeal from Decision of Court of Revision—Person Assessed—Opposing Ratepayer—Forum—District Court Judge—Ontario Railway and Municipal Board—Conflict—Construction of Statutes.*

Upon the facts contained in a statement of the Judge of a District Court, referred under sec. 77, sub-sec. 1, of the Assessment Act, 4 Edw. VII. ch. 23:—

*Held*, (1) that the time for appealing from an assessment of property in a municipality in an unorganised district is one month after the time fixed for returning the assessment roll.

(2) That the right of a ratepayer to appeal from the decision of the Court of Revision to the District Court Judge has not been taken away or interfered with by the appeal to the Ontario Railway and Municipal Board, given to a person assessed for over \$10,000, but not to the adverse party in such appeal (MEREDITH, J.A., dissenting).

(3) That, notwithstanding an appeal to the Board by the person assessed, referred to in the statement, it was the duty of the District Court Judge to hear and dispose of the appeal properly brought before him by the ratepayer (MEREDITH, J.A., dissenting).

A STATEMENT of facts in the nature of a case transmitted by the Judge of the District Court of the Provisional Judicial District of Rainy River, in the matter of the assessment of A. S. W., a ratepayer of the town of Fort Frances, in the district of Rainy River, and in the matter of an appeal therefrom to the Court of Revision, and of a further appeal from the decision of the Court



of Revision to the said District Court Judge, was referred, by order of the Lieutenant-Governor in Council, pursuant to sec. 77, sub-sec. 1, of the Assessment Act, 4 Edw. VII. ch. 23, to a Judge of the Court of Appeal for his opinion thereupon, and was referred by that Judge to the Court of Appeal.

The statement of facts referred to was as follows.

An appeal against the assessment of A. S. W., a married woman, was lodged with the Clerk of the Town of Fort Frances, after the expiration of fourteen days from the return of the assessment roll, but within one month after such return, and some time before the sitting of the Court of Revision of the Council.

A. S. W., the person assessed, was duly notified of the sittings of the Court, both by posting up and by personal service, but refused to attend the sittings.

The property appealed against had been assessed *en bloc*, instead of in the separate lots appearing on the plan into which the property is divided, as required by 4 Edw. VII. ch. 23, sec. 22. The Council's Court of Revision, relying on this as being "a palpable error," within the meaning of sec. 65, sub-sec. 19, of that Act, and also on sub-sec. 21 (the assessment having been opened by appeals undoubtedly lodged properly), and also being of the opinion that the time for appealing in municipalities in unorganised districts was, under R.S.O. 1897, ch. 225, sec. 43, one month, instead of fourteen days, adjudicated upon the appeal. An appeal from the Court of Revision was taken to myself as District Court Judge, within the proper time, by a member of the Court of Revision, who was a ratepayer. Subsequently, an appeal was launched from the decision of the Court of Revision to the Ontario Railway and Municipal Board, by a notice signed by H. W., the husband of A. S. W.—the name of A. S. W., the party assessed, not appearing in the notice.

The matter coming before me in due course, I held: first, that the original appeal was properly before the Court of Revision of the Council, and that, therefore, the matter was properly before me; second, that a statutory right of appeal to the District Court Judge having been given, and having been taken advantage of by a ratepayer, I was bound to determine his appeal;

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third, that that statutory right to appeal to the District Court Judge was not taken away by the provisions of sec. 76 of ch. 23, 4 Edw. VII., and amending Acts, or by R.S.O. ch. 225, sec. 48, and amending Act 5 Edw. VII. ch. 24; fourth, that even if such right was interfered with by the said Acts, the person assessed, A. S. W., could not take advantage of that fact in this instance, as the notice of appeal to the Ontario Railway and Municipal Board was not signed by her, or in her name, as provided by 5 Edw. VII. ch. 24, sec. 48*a*, but in the name of her husband, whose name did not appear in the assessment roll in connection with the properties in question.

Was I right in holding as I did?

The assessment roll being before me on appeals, undoubtedly properly launched, was I justified, under the provisions of 5 Edw. VII. ch. 24, sec. 3, in considering the particular appeal (even if not properly launched), if evidence was produced to shew that the property was insufficiently assessed, the person assessed having had ample notice of the hearing?

I may add that, subsequent to my holding as above, the Ontario Railway and Municipal Board heard the appeal lodged by the husband, H. W.; and, amongst other findings, held, in effect, that, where a person assessed for over \$10,000 appeals to the Board, the right of other ratepayers to appeal to the District Court Judge ceases.

All of which is respectfully submitted for the opinion of the Court, under the provisions of 4 Edw. VII. ch. 23, sec. 77, this 5th day of June, 1912.

By sec. 51 of the Ontario Railway and Municipal Board Act, 1906, 6 Edw. VII. ch. 31, the appeal provided for by sec. 76 of the Assessment Act shall be to the Ontario Railway and Municipal Board, instead of to the Board of County Court Judges, as therein provided; and, by sec. 52 of the said Act of 1906, instead of the appeal provided for by sec. 48*a* of the Act respecting the Establishment of Municipal Institutions in Territorial Districts being to a Judge of the High Court in Chambers in Toronto, it shall be to the Ontario Railway and Municipal Board.

By sec. 18 of the Assessment Amendment Act, 1910, 10 Edw. VII. ch. 88, sec. 76 of the Assessment Act, 4 Edw. VII. ch. 23, was repealed, and a new section was substituted therefor, in part as follows: "(1) Where there is an appeal from any Court of Revision under section 68 to a Judge of the County Court . . . and the person desiring to appeal has been assessed to an amount aggregating \$40,000, such person shall have the right to appeal from the Court of Revision to the Ontario Railway and Municipal Board. . . . (3) Sections 68 to 75 and sections 77 and 78 shall apply to all appeals taken under this section, and such Board shall have the powers and duties which by the said sections are assigned to a Judge of the County Court. (4) An appeal shall lie to the Court of Appeal from the decision of the Board, as provided by section 51 of the Ontario Railway and Municipal Board Act, 1906."

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Section 43 of the Act respecting the Establishment of Municipal Institutions in Territorial Districts, R.S.O. 1897, ch. 225, as amended by 4 Edw. VII. ch. 24, sec. 5 (2), reads as follows: "Any person assessed who thinks that he or any other person has been assessed too high or too low or who complains of any error or omission in regard to the assessment of himself or any person may, within one month after the time fixed for returning the roll, give to the clerk written notice of his grounds of complaint."

Section 45 of R.S.O. 1897, ch. 225, as enacted by 5 Edw. VII. ch. 24, sec. 1, is as follows: "Notwithstanding anything in the Assessment Act, or in any special Act contained, an appeal shall lie from the decision of the council or of any Court of Revision upon any complaint in respect of the first or any subsequent assessment, to the District Judge in the same manner as to the County Judge in other municipalities, and such appeal shall lie whether the municipality was organised under any general Act relating to municipal institutions or to municipalities of any class, or was incorporated by special Act or otherwise."

Section 48a of R.S.O. 1897, ch. 225, as enacted by 5 Edw. VII. ch. 24, sec. 3, is in part as follows: "(1) Where there is an appeal from any municipal council or Court of Revision

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under section 45 of this Act, to the District Judge, and a person desiring to appeal has been assessed upon one or more properties to an amount aggregating \$10,000, such person may, if he so desires, appeal to a Judge of the High Court in Chambers at Toronto . . . (2) An appeal shall lie to the Court of Appeal from any judgment or decision of the said Judge of the High Court in Chambers . . . .”

September 27, 1912. The case was heard by GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A., and LENNOX, J.

*J. Bicknell*, K.C., for the Corporation of the Town of Fort Frances, stated to the Court the nature of the questions submitted for their consideration, which arose in connection with the rights of appeal from the judgment of a Court of Revision given under R.S.O. 1897, ch. 225, and subsequent statutes. Counsel called the attention of the Court to the sections of the various statutes, which are cited and discussed in the judgments, and mentioned the fact that the stated case did not refer to the amending Act, 4 Edw. VII. ch. 24, sec. 5 (2). The main question was, whether the right of appeal to the District Court Judge was ousted by the appeal given to the Ontario Railway and Municipal Board.

No one appeared for the individuals interested.

January 15, 1913. MACLAREN, J.A.:—Upon the facts contained in the statement of His Honour C. R. Fitch, Judge of the District Court of the Provisional Judicial District of Rainy River, referred by an order in council approved by His Honour the Lieutenant-Governor on the 10th day of July, A.D. 1912, to a Judge of this Court, and by him referred to the full Court, for hearing and adjudication, this Court is of opinion:—

1. That the time for appealing to the Court of Revision against the assessment in this matter was one month after the time fixed for returning the assessment roll.

2. That the right of a ratepayer to appeal from the decision of the Court of Revision to the District Court Judge has not been taken away or interfered with by the appeal to the Ontario Railway and Municipal Board, given to a person assessed for over \$10,000, but not to the adverse party in such appeal.



3. That, notwithstanding such appeal to the said Board by the person assessed in this matter, it was the duty of the District Court Judge to hear and dispose of the appeal properly brought before him by the ratepayer.

The decision of the said Board not having been brought before this Court by appeal or otherwise, no opinion is expressed regarding it.

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GARROW and MAGEE, J.J.A., and LENNOX, J., concurred.

MEREDITH, J.A. (dissenting):—Whether this case comes within the provisions of the general enactment respecting the assessment of property in this Province for the purpose of municipal taxation, or within those of the special enactment respecting the establishment of municipal institutions in territorial districts, upon that subject, the proceedings before the District Court Judge, after the appeal to the Railway and Municipal Board, were, in my opinion, wholly unwarranted, as well as objectionable from every proper point of view.

In sec. 76 of the general enactment (the Assessment Act, 4 Edw. VII. ch. 23), and in the enactment, in the year next following that of the enactment of the general Act, of the Act relating to municipal institutions in unorganised territories, the Legislature was very careful to give to a person assessed a right of appeal to a higher Court, and to one more removed from local influences, than a local Judge—limited, however, to important cases, under the one enactment, only when the person appealing was assessed to the amount of \$20,000, and under the other, \$10,000; and it is important to observe that the appeal in the latter case was to the High Court of Justice, with a further appeal to the Court of Appeal, of the Province: see also 10 Edw. VII. ch. 88, sec. 18, as to appeal to the Board in cases coming under sec. 76 of the general assessment enactment.

In the year next following that in which the later of these enactments was passed, the Ontario Railway and Municipal Board was created by legislation which, in the plainest language possible, transferred the right of appeal, with which I have been dealing, from the tribunals upon which the jurisdiction was conferred by the earlier enactments to this Railway and Muni-

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cipal Board; that under the general enactment by sec. 51, and that under the special enactment by sec. 52, 6 Edw. VII. ch. 31 (O.) So that, unquestionably, the person assessed has in this case a right of appeal to the Board; and, not only is that so, but has appealed to that tribunal, which, after hearing the appeal fully on all questions of law and fact, has allowed the appeal. And upon that appeal the whole question of the assessment was reopened in all respects: see sec. 78 of the Assessment Act.

All this is, as I understand the case, not disputed; and is in any case indisputable. But it is contended that, because there is under each enactment a right of appeal, in all cases, to the Local Judge, from the Court of Revision, that Judge can exercise that jurisdiction in the special cases in which the Legislature has been so careful to give a right of appeal to a higher tribunal—to the Board and from the Board, on all questions of law, to this Court. A contention regarding which, however, as it seems to me, it is needful only to state the facts, to entirely condemn it.

The Courts do not sit for the purpose of making a farce of legislation; and what else would an adjudication, that a Local Judge has power to nullify the whole effect of an appeal given to the Board, and from the Board to this Court, by his interposition and contrary adjudication, be? The Legislature, in giving to the person assessed the appeal which she has taken, intended to give a substantial legal right, which no Court has any right to deprive her of in any way. Indeed, I would have thought that the absurd results which might flow, and probably would flow, if the District Court Judge is right in his view of the question, from effect being given to this contention in this case, ought to have been more than enough to have prevented the case which has been stated for our opinion ever coming to this Court.

Let me state the simple facts again, so that it may very plainly appear just what is being contended for, and which, indeed, the District Court Judge has attempted to uphold.

An appeal rightly taken to the Board and confirmed in this Court may be nullified by an appeal to the Local Judge; there

may be conflicting appeals and conflicting decisions upon the very same question; the Court of Appeal holding one way and the Local Judge the opposite, each holding being final.

Should I not add, too, that, even if such were the unfortunate state of the legislation, comity would require that the Local Judge should desist from anything that would lead to conflicting adjudications?

One of the first principles of the interpretation of statutes should, I have no doubt, have prevented any sort of encouragement being given to such a contention. Where there is a general enactment and a special enactment which may both cover the same thing, if there is any conflict between them, the provision of the special enactment must prevail.

Here there is a general right of appeal to the Local Judge, but the Legislature has seen fit to give to an aggrieved person a special right of appeal; if that right be not taken advantage of, then the general right remains intact—to appeal to the inferior tribunal; but, when it is once rightly invoked, it must override the general right, in so far as it is necessary to give full effect to the special legislation in favour of the person assessed.

It seems to me to be proper to add that, not only is that so, but that this case affords strong evidence of the wisdom of such legislation; for, as I understand the facts, the opponent of the person assessed is now, and throughout has been, a member of the Court of Revision—both judge and an active party litigant in his own case; and at his instance the ruling of the Local Judge, which, in my opinion, is entirely wrong, was made.

Questions respecting the time within which an appeal may be taken, and whether proper notice of appeal was given, were proper for the Board upon the appeal to them; and if any one, having a right to question their rulings, desire to do so, on any question of law, it must be done by way of appeal to this Court in regular manner; the Local Judge, having no jurisdiction over the case, cannot deal with them by adjudication or by way of a stated case.

I would answer the questions asked accordingly.

*Answers as stated by MACLAREN, J.A.*

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## [IN THE COURT OF APPEAL.]

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RICE LEWIS &amp; SON LIMITED v. GEORGE RATHBONE LIMITED.

Jan. 15.

*Mechanics' Liens—Claims of Material-men—Contract between Owner and Contractors—Provision for Payment of Percentage of Contract-price under Progress Certificates—Statutory Direction for Deduction of Percentage from "Payments to be Made"—Retention for Benefit of Lien-holders—Mechanics and Wage-Earners Lien Act, 10 Edw. VII. ch. 69, secs. 6, 10, 11, 12, 15.*

Upon claims to enforce liens for materials furnished to contractors for the erection of houses, it appeared that, under the contract, eighty per cent. of the value of the work done, to be estimated at contract-prices, was to be paid, from time to time, on progress certificates, by the owner to the contractors; and a considerable sum became thus payable. By sec. 12 of the Mechanics and Wage-Earners Lien Act, 10 Edw. VII. ch. 69, twenty per cent. is to be deducted from "any payments to be made" on the contract; and the amount of such deduction is to be retained for the benefit of lien-holders:—

*Held*, that to the extent of twenty per cent. on payments made upon progress certificates, the owner was liable to lien-holders; and if, over and above the amount of these progress certificates, any sum ever became payable by the owner to the contractors, twenty per cent. of that also was available to lien-holders. Different considerations would apply if there had been no contract to pay except on fulfilment of the contract on the contractors' part.

Sections 6, 10, 11, 12, and 15 of the Act, considered.

History of the legislation and review of the authorities.

*Russell v. French* (1897), 28 O.R. 215, approved and followed.

*Farrell v. Gallagher* (1911), 23 O.L.R. 130, and *McManus v. Rothschild* (1911), 25 O.L.R. 138, overruled in so far as anything decided in those cases is contrary to the above ruling.

APPEAL by lien-holders, in a proceeding to enforce a mechanics' lien, from the judgment of Mr. J. A. C. Cameron, an Official Referee, holding that the appellants were not entitled to any amount whatever upon the taking of the accounts as between the owner (the defendant Harvey), the contractors (the defendants George Rathbone Limited), and the lien-holders.

The claims were for materials furnished to the contractors for the erection of three brick houses. Before the completion of the contract, the contractors abandoned the work, and the owner was compelled to pay for completing the houses a sum which, with the payments made to the contractors, exceeded the contract-price; and the Referee held that, in the circumstances, the appellants' liens could not be enforced as against the owner.

September 24, 1912. The appeal was heard by GARROW, MACLAREN, MEREDITH, and MAGEE, JJ.A.



*F. E. Hodgins*, K.C., for the lien-holders, the appellants, referred to *Russell v. French* (1897), 28 O.R. 215, and *Goddard v. Coulson* (1884), 10 A.R. 1. In *Farrell v. Gallagher* (1911), 23 O.L.R. 130, a Divisional Court dissented from *Russell v. French*; but it makes no difference whether or not they had the right to dissent. Reference was also made to *Re Cornish* (1884), 6 O.R. 259; *In re Sear and Woods* (1893), 23 O.R. 474, 478; *Torrance v. Cratchley* (1900), 31 O.R. 546; *McManus v. Rothschild* (1911), 25 O.L.R. 138.

*I. F. Hellmuth*, K.C., and *F. J. Dunbar*, for the owner, the defendant Harvey, argued that the *Farrell* case, which was followed in the *McManus* case, should be followed in the case at bar. Special reference was made to the judgment of Riddell, J., in the *McManus* case, in which a fresh examination is made of the legislation and the decisions. They also referred to an article in 7 C.L.J., p. 81 (1887).

*Hodgins*, in reply, referred to Phillips on Mechanics' Liens, 3rd ed., p. 265; Jones on Liens, 2nd ed., vol. 2, sec. 1285; *Henry & Coatsworth Co. v. Evans* (1888), 97 Mo. 47, at p. 58; *Dominion Radiator Co. v. Cann* (1904), 37 N.S.R. 237.

January 15, 1913. MEREDITH, J.A.:—When rightly understood, the case of *Russell v. French*, 28 O.R. 215, seems to me to have been well decided; and, when the facts of this case are rightly understood, the question involved in it is easily solved, even without the aid of that case.

Under the Mechanics and Wage-Earners Lien Act, 10 Edw. VII. ch. 69, "twenty per cent." is to be deducted from "any payments to be made" on the contract: sec. 12; and the amount of such deduction is to be retained for the benefit of lien-holders.

Under the contract in question, eighty per cent, of the value of the work done, to be estimated at contract-prices, was to be paid, from time to time, on progress certificates, by the owner to the contractors; and a very considerable sum became thus payable to them; which, if it had not been paid, they could have recovered in an action, except as to "twenty per cent." of it, which the Act required the owner to retain for the benefit of others who were putting their labour and building materials into his building, and might have liens for them.

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To the extent, then, of twenty per cent. on these payments, at least, I would have thought it obvious that the owner is liable to lien-holders; and if, over and above the amount of these progress certificates, any sum ever became payable by the owner to the contractors, twenty per cent. of that also is available to lien-holders.

How is there any way of escape from that conclusion? And why should there be? If the Act opens such a way—if the owner's contentions be right—it would not be an Act for the benefit of lien-holders, but would be an Act for the relief of owners against their contracts to pay. In this the Act puts no additional liability on the owner; it accepts his own obligation, contracted by himself, to pay, as the basis of lien-holders' rights, and provides merely that out of the amounts he has bound himself, and has become liable, to pay, unconditionally, to his contractor, he shall retain twenty per cent. for lien-holders.

There is nothing harsh or unjust to him in that; it would be harsh and unjust if the Act enabled him, for his own benefit only, to disregard his own contract to pay. Nor is it unreasonable that he should be made a trustee of a reasonable portion of the money he ought otherwise to pay to the contractor, retained for the one purpose of preventing sub-contractors and others putting work and material into the building, which is his, from being "done out" of their pay for it by the contractor.

All this accords with every one of the provisions of the Act respecting lien-holders; such twenty per cent. is to be deducted and retained from "payments to be made by him in respect of the contract:" sec. 12; is "limited to the amount owing to the contractor:" sec. 11; is not out of any "greater sum than the sum payable by the owner to the contractor:" sec. 10; and is "limited, however, in amount to the sum justly due to the person entitled to the lien and to the sum justly owing . . . by the owner:" sec. 6.

Different considerations would apply if there had been no contract to pay except on fulfilment of the contract on the contractors' part.

The Act, thus understood, creates no hardship on the owner;

if he choose to pay when he is under no obligation to pay, he pays at his own risk as to the ultimate result; if he retain twenty per cent. out of every payment he has made himself liable for by his contract, he does that which the Act requires, and is as well off as if the Act had never been passed; whilst, if he fail to do as the Act requires, if he do not retain the twenty per cent. for lien-holders, he runs the risk of having to pay over again—a very reasonable penalty for defiance of the plain law of the land. As it is, the Referee has given to the owner, to secure him against the default of his contractor, not only the twenty per cent. which, by his contract, in agreeing to pay eighty per cent. only, he had retained for that purpose; but also the twenty per cent. of which the Act made him trustee for lien-holders; an obviously, I would have thought, erroneous result; reached perhaps by reason of not quite grasping all the facts and circumstances of the case.

But, driven to the last ditch, the respondent contends that the provisions of sec. 15 of the Act, respecting liens for wages, are inconsistent with this view, and ought to prevent effect being given to it; because there express provision is made that the twenty per cent. shall apply to contracts not completely fulfilled, and shall be calculated on the value of the work and materials, having regard to the contract-price, if any; and shall not be applied, in case of default in completing the contract, to the completion of the contract or to damage for non-completion, “as against a wage-earner claiming a lien.” A contention, however, in my opinion, of no sort of conclusive effect, when applied to an enactment made up of different provisions enacted at different times; and, as to this particular section, an enactment prepared doubtless with the mind much more intently set on making a sure and most favourable provision for the earners of wages—whose liens would generally be comparatively very small—than upon just how this provision might fit in with the rest of the Act, or affect it. It seems to me quite certain, however that may be, that there was no intention, in adding that section, to affect the other provisions of the Act respecting liens for things other than wages.

But the contention loses entirely any weight which it might

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otherwise have, when it is observed that this section covers cases in which there are no progress certificates, in which there may be nothing ever payable by the owner to the contractor except the ultimate balance, if any; and so it goes far beyond any of the provisions of the Act in favour of other lien-holders.

The judgment of Rose, J., in the case of *Russell v. French*, shews plainly that the ruling in that case was based upon the same grounds as those upon which I have based my opinion in this case; and, if there be anything decided or said to the contrary in the cases of *Farrell v. Gallagher*, 23 O.L.R. 130, and *McManus v. Rothschild*, 25 O.L.R. 138, it ought, I think, for reasons which seem to me to be obvious, to be overruled.

I would allow the appeal; and refer the matter back to the Official Referee.

MAGEE, J.A.:—The growth of the provisions of the Mechanics and Wage-Earners Lien Act as to the relative rights of owner, contractor, suppliers of material, wage-earners, and sub-contractors, has been gradual. By R.S.O. 1877, ch. 120, secs. 3-10, and sec. 6 (as amended by 47 Viet. ch. 18, sec. 5, to accord with the original Act, 38 Viet. ch. 20, sec. 3), a lien was given unless there was an agreement to the contrary, but all payments made in good faith by the owner to the contractor, before written notice of the lien, operated as a discharge to the owner, and the lien-holder could not recover more than the owner was liable to pay to the contractor, and was limited to the amount payable to the contractor.

In 1878, by the amending Act, 41 Viet. ch. 17, it was declared, in sec. 1, that payments so made, up to ninety per cent. of the price to be paid for the work, operated as a discharge to the owner; and, by sec. 2, that the lien should, in addition to all other rights or remedies given by the Act, also operate as a charge to the extent of ten per cent. of the price to be paid by the owner. The section did not expressly state upon what the lien should be a charge, and there was no provision enabling or requiring the owner to withhold any percentage from the contractor. It was at this stage of the enactment that the transactions involved in *Goddard v. Coulson*, 10 A.R. 1, took place.



In 1882, the Mechanics Lien Act, 1882, 45 Vict. ch. 15, was passed, to make further provision for the liens of mechanics and labourers. By sec. 2, they were given a lien for wages up to thirty days' wages, and such lien was not to prejudice any lien under the Mechanics' Lien Act, R.S.O. 1877, ch. 120; and, by secs. 7-12, was to be enforced under the latter Act. By sec. 3, this lien for wages was to operate notwithstanding any agreement between owner and contractor excluding a lien; and, by sec. 4, it was, to the extent of ten per cent. of the price to be paid, to have priority over all other liens under the Act of 1877, and over any claim by the owner against the contractor for failure to complete his contract. Section 5 provided that, if any person other than the contractor had performed labour or supplied materials, the owner should, in the absence of a stipulation to the contrary, be entitled to retain, for a period of thirty days after the completion of the contract, ten per cent. of the price to be paid to the contractor. This was the first provision for retention. So far, there was no clause postponing claims by the owner to any lien except liens for wages. By (1884) 47 Vict. ch. 18, sec. 1, no agreement to which he was not a party and not signed by him should deprive any one of a lien; and, by sec. 8, the priority of liens for wages was declared not to be affected.

It was in May, 1884, that *Goddard v. Coulson*, 10 A.R. 1, came before the Court of Appeal. The contractor, one Crittenden, had failed in 1879 to complete his contract, and had been paid as much as the value of the work done, and it had cost the owners more than the balance of the contract-price to complete the work. It was held that the plaintiffs, sub-contractors, had no lien as against the defendants the owners. The contract was not put in evidence, and it was not shewn that anything had in fact become payable by the owner till completion. Hagarty, C.J.O., pointed out that, under the Act, the owner was not to be liable to pay any greater sum than what was payable by him to the contractor, and did not consider that the Act of 1878 affected that principle, or that the Court could extend "ten per cent. of the price to be paid" to mean "ten per cent. on a price for work which had never been done." Patterson,

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J.A., said that the lien was to operate as a charge to the extent of ten per cent. of the price to be paid by the owner, but he thought that could not fairly do more than charge ten per cent. of the money which becomes payable by the owner to the principal contractor; and that, so far as the evidence shewed, the contract-price never became the price to be paid, because the contractor failed to do what was necessary to earn it, or to earn more than he was paid, which was under ninety per cent. He considered that view to be in accordance with what might be inferred from 45 Vict. ch. 15, sec. 4, to be the understanding of the law by the Legislature in giving a lien for wages priority over a claim by the owner, but he was not prepared to say that, even under that Act, the owner could be compelled to pay the workmen money for which he never became indebted to the contractor, and he suggested that possibly it only postponed a cross-demand of the owner. It will thus be seen that the case turned upon the fact that no money became payable to the contractor, so far as appeared. In *In re Sear and Woods*, 23 O.R. 474 (1893), the Queen's Bench Division came to a like conclusion, and apparently so also in *Truax v. Dixon* (1889), 17 O.R. 366. In *Re Cornish* (June, 1884), 6 O.R. 259, the Chancery Division allowed the charge of the lien-holders upon the ten per cent. of the work done as against the owner, no reference being made to *Goddard v. Coulson*, decided shortly before.

In R.S.O. 1887, ch. 126, these various enactments were consolidated. In sec. 10, the words "save as herein provided" were prefixed to the declaration that the owner was not to be liable to a greater sum than the sum payable by him to the contractor. For the insertion of those words, the reference is to 45 Vict. ch. 15, sec. 4, shewing that they referred to the lien for thirty days' wages. In that consolidating Act, there was impliedly a distinction between the two classes of liens, and from the express postponement of the claims of the owner to the lien of the wage-earner, it might be inferred that the Legislature did not consider the owner's claims postponed to other liens. By 53 Vict. ch. 38, the amount of the percentages was changed.

By 56 Vict. ch. 24, provision was made for deductions from payments to contractors in cities of the amount due wage-

earners, which was repealed by 59 Vict. ch. 35; but it may be referred to as shewing the policy aimed at. In sec. 2 of 56 Vict. ch. 24, the percentage which the owner was entitled to retain was referred to as the percentage "to be retained." Section 4 declared that the lien for thirty days' wages would not be defeated by attachments, garnishments, or executions, or by reason of the work contracted for being unfinished, or of the price, for that or any other reason, not being payable to the contractor; but, by sec. 5, in case of the contract not having been completely fulfilled when the lien was claimed by wage-earners, the percentage was to be calculated on the work done or materials furnished by the contractor; and every wage-earner was to be entitled to enforce a lien in respect of an unfinished building to the same extent as if finished; and the percentage was not, as against wage-earners, to be applied to the completion of the work, nor to the payment of damages for the non-completion thereof by the contractor.

Here again, in an Act intended according to its title to facilitate the enforcement of the just rights of wage-earners and sub-contractors, we find the Legislature abstaining from expressly extending to other liens the advantages it was giving to liens for wages as against the owner.

In 1896, 59 Vict. ch. 35 was passed, repealing the existing Acts and consolidating and remodelling the provisions. The sections as to deducting from payments to contractors in cities were dropped. By sec. 5, the lien was limited to the sum "justly owing by the owner," with the addition of the words "excepting as herein provided," thus according with the previous enactment, R.S.O. 1887, ch. 126, sec. 10, already mentioned. Section 9 likewise limited the lien to the amount "owing to the contractor save as herein provided;" and sec. 8 declared that the "lien shall not attach so as to make the owner liable for a greater sum than the sum payable by the owner to the contractor," but "save as herein provided."

But the chief change was made by sec. 10, which directed that "in all cases an owner shall as any contract progresses deduct from any payments to be made, and retain for a period of thirty days after the completion or abandonment of the contract," twenty per cent. (or in some cases fifteen per cent.) of

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the value of the work, service, and materials actually done, placed, or furnished; such values to be calculated on the basis of the price to be paid for the whole contract; and declared that "the liens created by this Act shall be a charge upon the amounts directed to be retained by this section." Sub-section 2 of sec. 10 again declared that all payments up to eighty per cent. (or eighty-five per cent.) of such value, made in good faith by an owner to a contractor, before notice in writing of such lien, should operate as a discharge *pro tanto* of the lien created by the Act.

Here, then, the lien created against the land by sec. 5 was made a charge, not to the extent of a percentage of the price to be paid as before, but a charge for the whole amount of the lien upon a specified fund which the owner was not required, and not merely entitled, to retain. But, when we look to see what the fund is, we find that it consists of sums deducted from "payments to be made." If there are no payments made or to be made, there will be no deductions, and hence no fund to be charged, but the lien will still hold its position under sec. 5 against the property, and be limited as therein to the sum justly owing (excepting as the Act provides) by the owner.

Instead of the priority given by 56 Vict., ch. 24, secs. 4 and 5, only to liens for wages over attachments, garnishments, and executions, and claims of the owner, we now find in sec. 12 all liens given priority over attachments, garnishments, and executions, assignments, judgments, etc., and nothing said about priority over claims of the owner. But, under sec. 13, mechanics' and labourers' liens for wages, up to thirty days' wages, have priority over other liens "to the extent of and on the twenty per cent. or fifteen per cent., as the case may be, of the contract price directed to be retained by section 10 . . . to which the contractor or sub-contractor through whom such lien is derived is entitled;" and (sub-sec. 2) every wage-earner was to be entitled to enforce a lien in respect of the contract not completely fulfilled: and (sub-sec. 3) when the lien was claimed by a wage-earner, the percentage was to be calculated on the work done or materials furnished by the contractor (or sub-contractor) employing him; and (sub-sec. 4), where the contractor made default



in completing his contract, the percentage aforesaid was not, as against a wage-earner, to be applied to the completion of the contract, or for any other purpose, by the owner, or damages for non-completion, nor to satisfaction of any claim against the contractor.

In thus giving special rights to wage-earners side by side with provisions for lien-holders generally, and in taking away from the owner, in favour of the wage-earner, the ordinary legal right which the owner would otherwise have of resisting payment beyond what he had agreed to, it must, I think, be taken that the Legislature had no intention of conferring such special rights upon other lien-holders dealt with in the same statute, and that the latter are confined to whatever rights the language giving the lien upon the land and the charge upon the "payments to be made" by the owner confer upon them.

If an owner contemplating building chooses to say, "I will not pay until completion," I do not see that the statute has advanced the rights of the general lien-holders, not being wage-earners, beyond the position of the plaintiff in *Goddard v. Coulson*, and they are still limited to the amount owing from the owner. No doubt, under sec. 4 of the Act of 1896, now sec. 5 of the Act of 1910, the lien-holder is not to be deprived of his lien by an agreement between the owner and the contractor to which he is not a party; but, if the lien does not arise, he cannot be said to be deprived of it. On the other hand, if the owner chooses to agree to make payments to the contractor before completion, he cannot complain that a portion of that which he is willing to part with should be set aside, not for his security, but for the security of others whose labour or materials have gone to benefit his property. If the owner agrees to pay seventy-five per cent. of the progress certificate as the work progresses, he is retaining twenty-five per cent. of his own accord for his security; and, when the statute only says that you shall keep back twenty per cent. of these progress certificates, and the lien-holders shall have a charge thereon, it does not do so to increase his security or to enable him to say it never was payable. As put by Rose, J., in *Russell v. French*, 28 O.R. 215: "The owner being willing that the contractor should receive the stipulated

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percentage, and that no part of the same should be retained as security, the statute takes from such percentage twenty per cent. of the value of the work, and sets it apart as a fund for the lienholders, and thereafter it is available for them only, and not as a fund to which the owner can resort as security against or to make good any loss occasioned by the non-completion of the contract."

No change affecting the appeal has been made since 1896 by 60 Vict. ch. 24 (by sec. 2 of which payment over of the retained percentage was allowed after the expiration of the thirty days, and the liens were made a charge in favour of "sub-contractors"); nor on the revision of the statutes in 1897; and the present Act of 1910, 10 Edw. VII. ch. 69, in secs. 5, 6, 10, 11, 12, 14, and 15, in so far as regards the question here involved, is substantially the same as that of 1896.

In *Farrell v. Gallagher*, 23 O.L.R. 130, a Divisional Court, and in *McManus v. Rothschild*, 25 O.L.R. 138, Riddell, J., came to a conclusion different from that in *Russell v. French*. The statutes and decisions were in *Farrell v. Gallagher* very fully dealt with by Middleton, J., who said (p. 139): "The section still recognises that the charge is a charge upon money to become payable to the contractor." In these words lies, I think, the reason of the failure to agree with *Russell v. French*. With much respect, I would point out that the charge is not upon money to become payable, but upon money which has actually become payable, a payment which is to be made and is directed to be retained. One may well agree, at least with regard to others than wage-earners, with the next sentence of Middleton, J., that "when, by reason of the contractor's default, the money never becomes payable, those claiming under him and having this statutory charge upon this fund, if and when payable, have no greater right than he himself had, and their lien fails."

In my opinion, the true meaning of the statute is, that if the owner has agreed to pay moneys before completion of the contract, whether fixed amounts or sums arrived at by an architect's progress certificate or otherwise, and they actually become payable, he must retain the same to the extent of twenty (or fifteen) per cent. of the value of the work and materials

to the date for payment, calculated as prescribed in the Act, and upon this percentage the liens will be a charge. But, except in so far as moneys become actually payable, there is no percentage upon which liens other than wage-earners' liens can become a charge.

In the present case, the owner had agreed to pay eighty per cent. as the work progressed. It does not appear that any evidence was given as to what amounts actually became payable, or what value is to be placed on the work and materials up to the date of the last amount payable.

The matter should, therefore, go back to the Referee, who followed *Farrell v. Gallagher*, to be dealt with in accordance with the statute, and the appellants should have their costs of the appeal.

GARROW and MACLAREN, JJ.A., concurred.

*Appeal allowed with costs.*

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## APPENDIX

Cases reported in the Ontario Law Reports and Ontario Weekly Notes decided on appeal to the Judicial Committee of the Privy Council and the Supreme Court of Canada, reported since the publication of volume 26 Ontario Law Reports:—

ATTORNEY-GENERAL FOR ONTARIO v. CANADIAN NIAGARA POWER Co., 3 O.W.N. 545, reversed by the Judicial Committee: [1912] A.C. 852.

BENNETT v. HAVELOCK ELECTRIC LIGHT Co., 25 O.L.R. 200: appeal quashed by the Supreme Court of Canada: 46 S.C.R. 640.

BRULOTT v. GRAND TRUNK PACIFIC R.W. Co., 24 O.L.R. 154, affirmed by the Supreme Court of Canada: GRAND TRUNK PACIFIC R.W. Co. v. BRULOTT, 46 S.C.R. 629.

CANADIAN GAS POWER AND LAUNCHES LIMITED v. ORR BROTHERS LIMITED, 23 O.L.R. 616, affirmed by the Supreme Court of Canada: 46 S.C.R. 636.

DOMINION LINEN MILLS Co. v. LANGLEY, 2 O.W.N. 1255, affirmed by the Supreme Court of Canada: DOMINION LINEN MANUFACTURING Co. v. LANGLEY, 46 S.C.R. 633.

FARQUHARSON v. BARNARD ARGUE ROTH STEARNS OIL AND GAS Co. LIMITED, 25 O.L.R. 93, affirmed by the Judicial Committee: BARNARD-ARGUE-ROTH-STEARN'S OIL AND GAS Co. LIMITED v. FARQUHARSON, [1912] A.C. 864.

GOWGANDA-QUEEN MINES LIMITED v. BOECKH, 24 O.L.R. 293, affirmed by the Supreme Court of Canada: BOECKH v. GOWGANDA-QUEEN MINES, 46 S.C.R. 645. Leave to Appeal to the Judicial Committee of the Privy Council refused on the 25th July, 1912.

HENDERSON AND TOWNSHIP OF WEST NISSOURI, RE, 24 O.L.R. 517: leave to appeal refused by the Supreme Court of Canada: 46 S.C.R. 627.

KAISERHOF HOTEL Co. v. ZUBER, 25 O.L.R. 194, affirmed by Supreme Court of Canada: 46 S.C.R. 651.

KLINE BROTHERS & Co. v. DOMINION FIRE INSURANCE Co., 25 O.L.R. 534, affirmed by the Supreme Court of Canada: 47 S.C.R. 252.

MORTON v. ANGLO-AMERICAN INSURANCE Co., 2 O.W.N. 1470, affirmed by the Supreme Court of Canada: ANGLO-AMERICAN FIRE INSURANCE Co. v. MORTON, 46 S.C.R. 653.

NELLES v. HESSELTINE, 3 O.W.N. 65, affirmed by the Supreme Court of Canada: HESSELTINE v. NELLES, 47 S.C.R. 230.

McPHERSON v. TEMISKAMING LUMBER Co., 3 O.W.N. 36, reversed by the Judicial Committee: [1913] A.C. 145.

RISPIN, RE, 25 O.L.R. 633, affirmed by the Supreme Court of Canada: IN RE RISPIN, CANADA TRUST Co. v. DAVIES, 46 S.C.R. 649.

SHAW v. MUTUAL LIFE INSURANCE Co. OF NEW YORK, 23 O.L.R. 559, affirmed by the Supreme Court of Canada: 46 S.C.R. 606.

SIVEN v. TEMISKAMING MINING Co., 25 O.L.R. 524, affirmed by the Supreme Court of Canada: TEMISKAMING MINING Co. v. SIVEN, 46 S.C.R. 643.

SOVEREIGN BANK OF CANADA v. PARSONS, 24 O.L.R. 387, reversed by the Judicial Committee: PARSONS v. SOVEREIGN BANK OF CANADA, [1913] A.C. 160.

STECHER LITHOGRAPHIC Co. v. ONTARIO SEED Co., 24 O.L.R. 503, reversed by the Supreme Court of Canada: 46 S.C.R. 540.

STOCKS v. BOULTER, 3 O.W.N. 1397, affirmed by the Supreme Court of Canada: BOULTER v. STOCKS, 47 S.C.R. 440.

STRATI v. TORONTO CONSTRUCTION Co., 2 O.W.N. 1067, affirmed by the Supreme Court of Canada: TORONTO CONSTRUCTION Co. v. STRATI, 46 S.C.R. 631.

TORONTO AND NIAGARA POWER Co. v. TOWN OF NORTH TORONTO, 25 O.L.R. 475, reversed by the Judicial Committee: [1912] A.C. 834.

WARREN GZOWSKI & Co. v. FORST & Co., 24 O.L.R. 282, affirmed by the Supreme Court of Canada: 46 S.C.R. 642.

WEST LORNE SCRUTINY, RE, 26 O.L.R. 339, affirmed by the Supreme Court of Canada: IN RE WEST LORNE SCRUTINY, McPHERSON v. MEHRING, 47 S.C.R. 451.

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## ANIMALS.

1. *Dog Killed when Trespassing — Justification — Apprehended Danger to Sheep—R.S.O. 1897, ch. 271, sec. 9(c)—Municipal By-law Authorising Destruction of Dog—Municipal Act, 1903, sec. 540—Powers of Legislature—Compensation—"Found Running at Large"—Findings of Trial Judge—Appeal—Damages.*]—The plaintiff's collie dog was killed by the defendants on their farm, whereon sheep were kept. A by-law passed by the council of the township in which the farm was situated provided: "It shall not be lawful for any dog to run at large unaccompanied by its owner or by some member of such owner's family; and any dog . . . found so running at large at a greater distance than one-half mile from the premises of its owner, and unaccompanied therewith, may be killed by any resident ratepayer of this municipality:"—*Held*, that the council had power, under the Consolidated Municipal Act, 1903, sec. 540, sub-secs.

1 and 2, to pass this by-law, which was to be regarded as a by-law restraining and regulating the running at large of dogs, and for killing dogs running at large contrary to the by-law.—But *held*, upon the evidence, that the killing of the dog was not justified under the by-law; RIDDELL, J., dissenting.—Judgment of the County Court of the County of Prince Edward affirmed. — *Per* BRITTON, J.:—"The dog was not at first "found" on the defendants' premises. Before it came upon the defendants' premises, it was "found," in the sense of being seen by the defendants, upon the highway within half a mile of the plaintiff's premises. — *Per* RIDDELL, J.:—"The Act for the Protection of Sheep and to Impose a Tax on Dogs, R.S.O. 1897, ch. 271, sec. 9(c), afforded a perfect defence to the action: the evidence established that it was after sunset that the dog was killed—the dog was found straying, and it was on a farm whereon sheep were kept.—But, in any case, the by-law was sufficient to protect the defendants. —The Legislature has power to make laws providing for the forfeiture or destruction of property without compensation to the owner: *Florence Mining Co. v. Cobalt Lake Mining Co.* (1908), 18 O.L.R. 275, 279.—

The Legislature, by sub-clause (a) of sub-sec. 2 of sec. 540 of the Consolidated Municipal Act, 1903, simply intended to remove from the realm of controversy the question whether a dog was running at large in the one case, and to lay down as a matter of law that, when a dog was "found in a street or other public place . . . not under the control of any person," it was running at large. But no other case was provided for; and in any other case the question of running at large *aut non* remains a question of fact.—The dog was "found" where and when it was killed—on the defendants' premises—although previously seen by the defendants on the highway.—*Per Curiam*:—The trial Judge's assessment of the plaintiff's damages at \$125 could not, upon the evidence, be interfered with. *McNair v. Collins*, 44.

2. *Injury from Bite of Trained Monkey — Keepers or Harbourers—Evidence—Liability for Act of Naturally Wild and Mischievous Animal.*—An infant was bitten by a trained and performing monkey, which was tied up in a yard adjoining the premises of the defendants, in the interval between performances given in the defendants' theatre; and the infant and his father sued for damages caused by the injury:—*Held*, upon the evidence, that the defendants did not keep or harbour the monkey, and were not responsible for its misconduct or mischief. They

could not be accounted keepers or vicarious keepers, unless when the monkey was actually upon their own premises.—Discussion of the law and authorities upon the question of the responsibility for keeping or harbouring animals naturally wild and mischievous which have been trained to serve some purpose for the use of man. *Connor v. "The Princess Theatre,"* 466.

### APARTMENT HOUSE.

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### APPEAL.

*See* ANIMALS, 1—ASSESSMENT AND TAXES, 1—CONTRACT—COSTS—CRIMINAL LAW, 1, 4—DAMAGES—FRAUDULENT CONVEYANCE—JUDGMENT DEBTOR—LANDLORD AND TENANT, 3—MANDAMUS—MUNICIPAL CORPORATIONS, 1—NEGLIGENCE, 3—PHYSICIANS AND SURGEONS—SOLICITORS—SUPREME COURT OF CANADA.

### ARBITRATION AND AWARD.

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### ASSESSMENT AND TAXES.

1. *Appeal to Court of Revision—Municipality in Unorganised District—Assessment Acts and Amendments—Act respecting Municipal Institutions in Territorial Districts—Appeal from Decision of Court of Revision—Person Assessed—Opposing Ratepayer—Forum—District*



*Court Judge—Ontario Railway and Municipal Board—Conflict—Construction of Statutes.*]—Upon the facts contained in a statement of the Judge of a District Court, referred under sec. 77, sub-sec. 1, of the Assessment Act, 4 Edw. VII. ch. 23:—*Held*, (1) that the time for appealing from an assessment of property in a municipality in an unorganised district is one month after the time fixed for returning the assessment roll.—(2) That the right of a ratepayer to appeal from the decision of the Court of Revision to the District Court Judge has not been taken away or interfered with by the appeal to the Ontario Railway and Municipal Board, given to a person assessed for over \$10,000, but not to the adverse party in such appeal (MEREDITH, J.A., dissenting).—(3) That, notwithstanding an appeal to the Board by the person assessed, referred to in the statement, it was the duty of the District Court Judge to hear and dispose of the appeal properly brought before him by the ratepayer (MEREDITH, J.A., dissenting).—Consideration of the following statutory provisions: R.S.O. 1897, ch. 225, secs. 43, 45, 48, 48a; 4 Edw. VII. ch. 23, secs. 22, 65, 76, 77; 4 Edw. VII. ch. 24, sec. 5 (2); 5 Edw. VII. ch. 24, secs. 1, 3; 6 Edw. VII. ch. 31, secs. 51, 52; 10 Edw. VII. ch. 88, sec. 18. *Re Fort Frances Assessment*, 622.

2. *Tax Sale—Action to Set aside—Time-limit — Assessment*

*Act, 1904, sec. 173—Commencement of Statutory Period—Date of Tax Sale or Tax Deed—Irregularities in Sale—Non-compliance with Statute—Validating Act, 10 Edw. VII. ch. 124, sec. 4—Construction.*]—In an action to set aside a sale of land in the City of Port Arthur for taxes in arrear for 1905, 1906, and 1907, made on the 16th November, 1908, and a deed executed by the Mayor and Treasurer of Port Arthur, on the 19th January, 1910, conveying the land to the defendant:—*Held*, in this agreeing with the judgment of LENNOX, J., that the sale was irregular by reason of non-compliance with the provisions of the Assessment Act, 4 Edw. VII. ch. 23, and could not stand unless saved by legislation.—But *held*, reversing the judgment of LENNOX, J., that the sale was validated and confirmed by sec. 4 of an Act respecting the City of Port Arthur, 10 Edw. VII. ch. 124.—*Held, per* LENNOX, J., following *Donovan v. Hogan* (1888), 15 A.R. 432, that the plaintiff was not barred by sec. 173 of the Assessment Act; for “the time of sale,” mentioned in that section, means the time of the delivery of the tax deed, which was less than a year before action.—*Per* RIDDELL, J., that it was not necessary, in view of the validating enactment, to consider whether a change in the wording of the section (now sec. 173 of the Assessment Act) which was interpreted by the Court of Appeal in *Donovan v.*

*Hogan*, had rendered the decision in that case inapplicable. In sec. 4 of 10 Edw. VII. ch. 124, a distinction is made between "sales" and "deeds;" "sales" before the 31st December, 1908, were validated in the first clause; "deeds" to convey the lands sold were validated in the second. *Errikkila v. McGovern*, 498.

3. *Tax Sale—Invalidity—Assessment Act, 1904, sec. 165 (2)—Lands of Non-resident—Notice Sent to Wrong Address—Address "Known" to Municipal Treasurer—Address Furnished under sec. 46 and not Revoked.*]—Where land of which the plaintiff was the registered owner was sold for taxes, the sale was set aside and the plaintiff was allowed to redeem, after the period for redemption fixed by statute had expired, because the Treasurer of the municipality had not sent to the plaintiff, a non-resident, at the address furnished by him and entered in the Treasurer's books, and not revoked, the notice required by sec. 165 (2) of the Assessment Act, 4 Edw. VII. ch. 23, and the plaintiff had not received any notice—it being *held*, that the proper address was "known" to the Treasurer, and that it was not a compliance with the statute to send the notice to the address of the plaintiff appearing in the conveyance of the land to him, as if his address was "not known."—Sections 46, 101, and 165 of the statute considered.—Judgment of RIDDELL, J., reversed. *Gast v. Moore*, 515.

4. *Tax Sale—Indian Lands—Indian Act, R.S.C. 1906, ch. 81, secs. 58, 59, 60—Action to Set aside Sale and Deed—Statutory Time-limit—Application of—Action of Superintendent General—R.S.O. 1897, ch. 224, sec. 209—Essential Preliminaries to Validity of Sale not Observed—Right to Attack after Expiration of Two Years—Locus Standi of Plaintiffs—Lien of Purchaser for Improvements and Money Expended—Assessment Act, 4 Edw. VII. ch. 23, sec. 176 (1)—Non-retroactivity—Adoption of Statutory Rule notwithstanding—"He who Seeks Equity must Do Equity"—Right to Possession—Condition—Costs—Notice—Evidence—Sec. 181 of Act of 1904.*]—The provisions of secs. 58, 59, and 60 of the Indian Act, R.S.C. 1906, ch. 81, are to be read as applicable to a case where the Superintendent General of Indian Affairs has actively intervened as between the tax purchaser and the original purchaser of Indian lands. Where the Superintendent General has considered a tax deed and approved of it as a valid transfer, his ruling may be questioned by an action, which must be brought within two years after the date of the tax deed. But there is no such limit of time, so far as the Indian Act is concerned, in attacking an illegal tax sale and deed, if no action by way of approval has been taken by the Superintendent General; and,

where that is the case, the general law of the Province as to tax sales applies.—The statutory protection of sec. 209 of R.S.O. 1897, ch. 224—the Assessment Act in force at the time of the tax sale and tax deed in question in this action (1901-02)—does not avail, if there has been no legal impost of taxes, and if these, though legally imposed, have not been in arrear for three years next preceding the furnishing of the list of lands liable to be sold under sec. 152 of the Act, and if there has been no such list furnished at all.—And *held*, upon the evidence, that each one of these necessary preliminaries was absent in regard to the sale for taxes of unpatented Indian lands and the deed made pursuant to the sale, attacked in an action brought after the expiry of two years from the date of the deed; and the sale and deed should be set aside.—*Held*, also, that the plaintiffs had a sufficient *locus standi* to seek the intervention of the Court.—*Held*, also, that the defendant, the purchaser at the tax sale, under the particular frame of this action, was entitled to a lien upon the lands for improvements and for money expended for taxes and statute labour; but not under the Assessment Act of 1904, 4 Edw. VII. ch. 23, sec. 176 (1), as that Act did not come into force till the 1st January, 1905, and was not retroactive; nor under the Assessment Act in force when the rights of the plaintiffs accrued, R.S.O. 1897,

ch. 224, sec. 212, for that applied only when the sale was invalid by reason of uncertain and insufficient designation or description; the statute R.S.O. 1897, ch. 119, sec. 30, under which the relief is more restricted than under the Act of 1904, might be applied; but the Court was entitled to go beyond that in aid of the defendant; the plaintiffs, having come into a Court of Equity and obtained equitable relief—a declaration and adjudication that the sale and deed were invalid and should be set aside—must do equity; and the Court might well adopt as equitable the statutory rule laid down in sec. 176 (1) of the Assessment Act, 1904.—*Held*, also, that the plaintiffs were entitled to judgment for possession of the lands, not, however, to be made effective until the expiration of one month nor until the plaintiffs had paid into Court the amount for which the defendant was declared to have a lien: Assessment Act, 1904, sec. 176 (2), first clause.—*Held*, also, that the prerequisite for the application of sec. 217 (1), (2), of R.S.O. 1897, ch. 224 (sec. 181 of the Act of 1904), is that, at the trial, it must be found that a certain notice was not given; and, as it was not so found and there was no evidence upon which it could be so found, the section did not apply; and, at any rate, awarding the costs of the action to the plaintiffs was a sufficient compliance with the section, without awarding also the costs of a reference,



which were left to be disposed of by the Master.—Judgment of BOYD, C., affirmed. *Richards v. Collins*, 390.

### ASSIGNMENT FOR BENEFIT OF CREDITORS.

See BANKS AND BANKING, 2.

### ASSIGNMENT OF BOOK-DEBTS.

See BANKS AND BANKING, 2.

### ASSIGNMENT OF BUILDING CONTRACTS.

See BANKS AND BANKING, 2.

### ATTORNEY-GENERAL.

See CROWN — WATER AND WATERCOURSES, 1.

### AUTHOR.

*Preparation of Biography—Access to Private Collection of Documents — Misrepresentation as to Character of Proposed Work—Undertaking—Breach of Faith—Delivery up of Extracts and Copies—Use of Information Obtained—Restraint of—Injunction — Nominal Damages.*]

Where a person obtains possession of or access to property of another, by misrepresentation or by concealment of facts which he was bound to disclose, he will be restrained from making use of that property.—The defendant, as the result of the judgment in *Le Sueur v. Morang & Co. Limited* (1910), 20 O.L.R. 594 (affirmed by the Supreme Court of Canada, *Morang & Co. v. Le Sueur* (1911), 45 S.C.R. 95), obtained possession from the de-

fendants in that action of his manuscript “Life of William Lyon Mackenzie,” which had originally been prepared for publication as a volume in the series called “The Makers of Canada,” and proposed to publish it. When the defendant was preparing to write the “Life” for that series, the plaintiff, who was the grandson of William Lyon Mackenzie, allowed the defendant free access to his collection of books and papers called “the Mackenzie Collection,” and the defendant made extracts therefrom and copies thereof and obtained information therefrom which he used as part of the material for his book:—*Held*, upon the evidence, that the defendant had made use of the books and papers otherwise than in accord with the representation made by him to the plaintiff and the understanding between him and the plaintiff, which was, that he was to write a favourable or sympathetic account of the life and character of the subject, whereas the manuscript proposed to be published disclosed an opposite purpose and result.—*Held*, therefore, that the plaintiff was entitled to have delivered to him all the extracts from and copies of documents in the collection made by the defendant; to have the defendant restrained from publishing any book containing any of the extracts or copies or information obtained from the collection; and to nominal damages. *Lindsey v. Le Sueur*, 588.



**BALLOT.**

See MUNICIPAL CORPORATIONS, 3.

**BANKRUPTCY AND INSOLVENCY.**

See BANKS AND BANKING, 2—  
FRAUDULENT CONVEYANCE —  
COMPANY, 2.

**BANKS AND BANKING.**

1. *Customer's Deposit—Claim of Bank on Overdue Notes — Right of Set-off — Assertion of Lien — Relation between Customer and Bank — Creditor and Debtor — Application of Deposit on Cross-debt — When Made — Interest.*]

In the case of a deposit of money with a bank, the relation between the customer and the bank is that of creditor and debtor; there is no specific property of the customer in the bank upon which the bank can assert a lien; the bank's right is that of set-off. —At the death of L., the defendant bank had money on deposit to his credit bearing interest at three per cent.; and, when this was demanded by the plaintiffs (his executors), the bank, on the 6th January, 1910, refused to allow the money to be withdrawn until some settlement was made relative to overdue notes upon which L. was endorser. On the 29th April, 1911, a cheque upon the deposit account was given by the plaintiffs, and other payments were made sufficient to discharge the whole indebtedness on the notes with interest as calculated by the plaintiffs:—*Held*, that, at any time after the

notes became due, the bank would have been entitled to apply the deposit on account of the indebtedness, or, in other words, to set off its indebtedness to the depositor against the depositor's indebtedness to the bank *pro tanto*. If on the 6th January, 1910, the bank so applied the deposit, the unpaid balance of the indebtedness continued to bear interest at five per cent., and on that basis was ultimately paid; but, if no application of the deposit was made, the bank wrongfully refused to allow it to be withdrawn, and the plaintiffs were entitled to interest at five per cent.—the result being the same. *Royal Trust Co. v. Molsons Bank*, 441.

2. *Securities Taken by Bank from Customer—Sawn Lumber — "Wholesale Purchaser" — "Products of the Forest"— "And the Products thereof"— Bank Act, sec. 88(1)—Assignment for Benefit of Creditors—Securities Given within Sixty Days—Continuation of Former Securities — Assignment of Building Contracts — Assignment of Book-debts.*]

The judgment of MEREDITH, C.J.C.P., 26 O.L.R. 291, was affirmed, upon appeal by the plaintiff and cross-appeal by the defendants to a Divisional Court, with one variation, viz., that, in so far as the book-debts assigned to the defendants represented materials pledged to them, they were, as against the plaintiff, entitled to follow the proceeds. — *Molsons*

*Bank v. Beaudry* (1901), Q.R. 11 K.B. 212, not followed. *Townsend v. Northern Crown Bank*, 479.

3. *Winding-up of Bank—Contributories—Bank Act, sec. 125—Transfer of Shares after Commencement of Winding-up Proceedings—Recognition by Liquidator of Transferees as Contributories—Winding-up Act, sec. 21—Mistake—Election—Evidence—Estoppel—Laches—Prejudice—Powers of Liquidator.*]—The appellants, who were the holders of paid-up shares of the capital stock of the Ontario Bank at the time of the commencement of winding-up proceedings, were held liable, under the provisions of sec. 125 of the Bank Act, R. S.C. 1906, ch. 29, there being a deficiency in the property and assets of the bank to pay its debts and liabilities, to an amount equal to the par value of the shares.—Transfers of the shares were made by the appellants and registered in the transfer-books of the bank after the winding-up proceedings began, but before the winding-up order was made; and, for some reason, the names of the transferees, and not the names of the appellants, were inserted in the first list of contributories prepared by the liquidator and settled by the Referee in the winding-up. Afterwards, upon the application of the liquidator, the Referee added the appellants' names to the list:—*Held*, that the appellants could not escape liability by reason of

the delay, by virtue of a supposed election of the liquidator to look to the transferees, or by estoppel, or otherwise. — *Per* GARROW, J.A.:—What was done by the liquidator and the Referee did not bring the case within the exception to be found in sec. 21 of the Winding-up Act, R.S.C. 1906, ch. 144, as to transfers made with the authority of the Court. It was a mistake or oversight on the part of the liquidator, and not the result of intention or design; and he alone was powerless to accept the transfers or release the appellants without payment. Mere delay in asserting the cause of action against the appellants was no defence; and there was no reasonable evidence that the delay was prejudicial to the appellants. And *quære*, whether, in any circumstances, estoppel could be successfully pleaded to such a claim. The liquidator's powers are limited; and he could not by mere laches accomplish what he could not with deliberation and intention do.—*In re National Bank of Wales, Massey and Giffin's Case*, [1907] 1 Ch. 298, distinguished.—*Per* MEREDITH, J.A.:—When the winding-up order was made, the appellants, as well as their transferees, were liable; and they had not become discharged from their liability. It was not a case for an election, because the liability was of each, not of only one or the other. The debt was a legal, statute-imposed debt; and no delay, short of bringing the case

within some statute of limitations, could relieve the appellants. The delay in enforcing payment from the appellants was not the result of mere oversight.—Order of *BOYD, C.*, affirmed. *Re Ontario Bank, Massey and Lee's Case*, 192.

See *GIFT*, 2.

### BIAS.

See *CRIMINAL LAW*, 4.

### BIOGRAPHY.

See *AUTHOR*.

### BOARD OF RAILWAY COMMISSIONERS.

See *CARRIERS—RAILWAY*, 1, 2.

### BONDS.

See *CONTRACT*.

### BOOK-DEBTS.

See *BANKS AND BANKING*, 2.

### BOUNDARY.

See *CROWN—WATER AND WATERCOURSES*, 1, 2.

### BROKER.

See *SOLICITORS*.

### BUILDING CONTRACT.

See *BANKS AND BANKING*, 2.

### BUILDING RESTRICTION.

See *DEED*.

### BUILDINGS.

See *MUNICIPAL CORPORATIONS*, 4, 5.

### BURGLARY.

See *CRIMINAL LAW*, 1.

### BY-LAWS.

See *MUNICIPAL CORPORATIONS*.

### CANCELLATION OF LICENSE.

See *CROWN*.

### CARRIERS.

*Express Company—Liability for Loss of Goods Received for Carriage—Limitation of—Special Contract—Want of Privity—Approval of Form by Board of Railway Commissioners—Railway Act, R.S.C. 1906, ch. 37, sec. 353—Common Carriers.*—The defendants, public carriers, were requested by the plaintiff to carry a box for him from the Grand Trunk Railway station at the city of S. to the town of G. The defendants obtained the box from the railway company, and lost it. Upon obtaining it, the defendants gave the baggageman at the railway station a receipt therefor, which read, "Received of G.T.R. (herein called the shipper)." The receipt was for a box, contents and value not given, addressed to the plaintiff at G., which the defendants agreed to carry and deliver upon the terms and conditions endorsed on the receipt, "to which the shipper agrees." On the back were printed conditions that the agreement should extend to and be binding upon the shipper and all persons in privity with him claiming or asserting any right to the ownership of the shipment, and limiting the liability of the defendants to the value declared by the shipper, or, if

no value declared, to \$50:—*Held*, assuming that this special contract applied, that it did not bind the plaintiff, who, for the purposes of the special contract, was neither the shipper nor a person in privity with the shipper; and the defendants were liable for the whole value of the contents of the box; for they had, as common carriers, taken the plaintiff's goods without limiting their liability to him, and lost them.—Although the Dominion Board of Railway Commissioners had approved of the form of contract used by the defendants "as the only form to be used," that meant the only form of contract "impairing, restricting, or limiting the liability of" the defendants: R.S.C. 1906, ch. 37, sec. 353; and there was nothing to prevent the defendants carrying goods without limiting their liability. — Judgment of WINCHESTER, Co.C.J., reversed. *Wilkinson v. Canadian Express Co.*, 283.

See RAILWAY.

### CASES.

*Alexander v. Irondale Bancroft and Ottawa R.W. Co.* (1898), 18 P.R. 20, distinguished.]—See EVIDENCE, 2.

*Baddeley v. Earl Granville* (1887), 19 Q.B.D. 423, followed.]—See MASTER AND SERVANT, 1.

*Baynes Carriage Co., Re* (1912), 27 O.L.R. 144, referred to.]—See EVIDENCE, 2.

*Belding Lumber Co. Limited,*

*In re* (1911), 23 O.L.R. 255, specially referred to.]—See COMPANY, 2.

*Bown, In re* (1884), 27 Ch.D. 411, distinguished.]—See WILL, 1.

*Brazill v. Johns, In re* (1893), 24 O.R. 209, followed.] — See CRIMINAL LAW, 3.

*British Vacuum Cleaner Co. v. New Vacuum Cleaner Co.*, [1907] 2 Ch. 312, distinguished.]—See TRADE-NAME.

*Brown v. McLean* (1889), 18 O.R. 533, 535, approved.]—See LIMITATION OF ACTIONS, 2.

*Butler v. Fife Coal Co.*, [1912] A.C. 149, specially referred to.]—See MASTER AND SERVANT, 1.

*Canadian Bank of Commerce v. Perram* (1899), 31 O.R. 116, referred to.]—See PHYSICIANS AND SURGEONS.

*Case v. Story* (1869), L.R. 4 Ex. 319, followed.]—See LIQUOR LICENSE ACT, 1.

*Coote v. Ford*, [1899] 2 Ch. 93, 99, followed.]—See COSTS.

*Dixon, Re* (1912), 56 Sol. J. 445, distinguished.]—See WILL, 2.

*Donovan v. Hogan* (1888), 15 A.R. 432, followed.]—See ASSESSMENT AND TAXES, 2.

*Drew v. The King* (1903), 33 S.C.R. 228, followed.] — See CRIMINAL LAW, 2.

*Elma, Township of, and Township of Wallace, Re* (1903), 2 O.W.R. 198, distinguished.]—See MUNICIPAL CORPORATIONS, 1.

*Elmore v. Pirrie* (1887), 57 L.T.R. 333.] — See VENDOR AND PURCHASER.



- Emma Silver Mining Co., In re* (1875), L.R. 10 Ch. 194, distinguished.]—See EVIDENCE, 2.
- Farrell v. Gallagher* (1911), 23 O.L.R. 130, overruled.]—See MECHANICS' LIENS, 1.
- Fearon, In re* (1897), 45 W.R. 232, distinguished.]—See WILL, 1.
- Ferguson v. Wilson* (1866), 15 L.T.R. 230, L.R. 2 Ch. 77, specially referred to.]—See VENDOR AND PURCHASER.
- Florence Mining Co. v. Cobalt Lake Mining Co.* (1908), 18 O.L.R. 275, followed.]—See ANIMALS, 1—CROWN.
- Foley v. Hill* (1848), 2 H.L.C. 28, 36, followed.]—See GIFT, 2.
- Formby v. Barker*, [1903] 2 Ch. 539, followed.]—See DEED.
- Gardner v. Perry* (1903), 2 O.W.R. 681, not followed.]—See LANDLORD AND TENANT, 2.
- Gordon-Cumming v. Houldsworth*, [1910] A.C. 537, 541, followed.]—See CROWN.
- Grey v. Pearson* (1857), 6 H.L.C. 61, 106, followed.]—See CROWN.
- Grinsted v. Toronto R.W. Co.* (1894), 21 A.R. 578, followed.]—See RAILWAY, 1.
- Groves v. Lord Wimborne*, [1898] 2 Q.B. 402, specially referred to.]—See MASTER AND SERVANT, 1.
- Handley v. Archibald* (1899), 30 S.C.R. 130, applied and followed.]—See LIMITATION OF ACTIONS, 1.
- Hipgrave v. Case* (1885), 28 Ch.D. 356, distinguished.]—See VENDOR AND PURCHASER.
- Hobbs v. London and South Western R.W. Co.* (1875), L.R. 10 Q.B. 111, distinguished.]—See RAILWAY, 1.
- Holden, In re* (1888), 57 L.J. Ch. 684, distinguished.]—See WILL, 2.
- Hutchings to Burt, Re* (1888), 59 L.T.R. 490, distinguished.]—See WILL, 1.
- Johnston, In re*, [1894] 3 Ch. 204, followed.]—See WILL, 1.
- Jones v. Hough* (1879), 5 Ex.D. 115, 122, followed.]—See DAMAGES.
- Keith v. Ottawa and New York R.W. Co.* (1902), 5 O.L.R. 116, specially referred to.]—See RAILWAY, 3.
- Kemerer v. Watterson* (1910), 20 O.L.R. 451, followed.]—See WRIT OF SUMMONS.
- King v. Northern Navigation Co.* (1911), 24 O.L.R. 643, affirmed.]—See NEGLIGENCE, 1.
- Lavery v. Pursell* (1888), 39 Ch.D. 508, distinguished.]—See VENDOR AND PURCHASER.
- Le Sueur v. Morang & Co. Limited* (1910), 20 O.L.R. 594, referred to.]—See AUTHOR.
- Levy v. Walker* (1879), 10 Ch.D. 436, 447, followed.]—See TRADE-NAME.
- London, Mayor, etc., of, v. Cox* (1867), L.R. 2 H.L. 239, followed.]—See CRIMINAL LAW, 3—DIVISION COURTS, 2.
- Long Point Co. v. Anderson, In re* (1891), 18 A.R. 401, 408, followed.]—See MANDAMUS.
- Turcott v. Wakely & Wheeler*, [1911] 1 K.B. 905, followed.]—See LANDLORD AND TENANT, 1.
- McGillivray v. Township of Lochiel* (1904), 8 O.L.R. 446, dis-

tinguished.] — *See* MUNICIPAL CORPORATIONS, 1.

*Mackay v. Douglas* (1872), L.R. 14 Eq. 106, specially referred to.] — *See* FRAUDULENT CONVEYANCE.

*Mackenzie v. Champion* (1885), 12 S.C.R. 649, specially referred to.] — *See* PRINCIPAL AND AGENT, 1.

*McMahon v. Field* (1881), 7 Q.B.D. 591, followed.] — *See* RAILWAY, 1.

*McManus v. Rothschild* (1911), 25 O.L.R. 138, overruled.] — *See* MECHANICS' LIENS, 1.

*McPherson v. Irvine* (1895), 26 O.R. 438, referred to.] — *See* GIFT, 1.

*Martyn v. Kennedy* (1853), 4 Gr. 61, followed.] — *See* CROWN.

*Merritt v. City of Toronto* (1911), 23 O.L.R. 365, affirmed.] — *See* WATER AND WATER-COURSES, 3.

*Molsons Bank v. Beaudry* (1901), Q.R. 11 K.B. 212, not followed.] — *See* BANKS AND BANKING, 2.

*Morang & Co. v. Le Sueur* (1911), 45 S.C.R. 95, referred to.] — *See* AUTHOR.

*National Bank of Wales, In re, Massey and Giffin's Case*, [1907] 1 Ch. 528, distinguished.] — *See* BANKS AND BANKING, 3.

*Noble v. Noble* (1912), 25 O.L.R. 379, reversed.] — *See* LIMITATION OF ACTIONS, 2.

*Noblett v. Hopkinson*, [1905] 2 K.B. 214, followed.] — *See* LIQUOR LICENSE ACT, 2.

*Northumberland Avenue Hotel Co., In re* (1886), 33 Ch.D.

16, 2 Times L.R. 210, distinguished.] — *See* VENDOR AND PURCHASER.

*Notting Hill, The* (1884), 9 P.D. 105, specially referred to.] — *See* RAILWAY, 1.

*Orford, Township of, v. Township of Howard* (1900), 27 A.R. 223, considered.] — *See* MUNICIPAL CORPORATIONS, 1.

*Ottawa Wine Vaults Co. v. McGuire* (1911), 24 O.L.R. 591, reversed.] — *See* FRAUDULENT CONVEYANCE.

*Peacock v. Freeman* (1888), 4 Times L.R. 541, distinguished.] — *See* PRINCIPAL AND AGENT, 1.

*Phillips v. South Western R. W. Co.* (1879), 4 Q.B.D. 506, 5 Q.B.D. 78, specially referred to.] — *See* DAMAGES.

*Plimmer v. Mayor, etc., of Wellington* (1884), 9 App. Cas. 699, followed.] — *See* IMPROVEMENTS.

*Powell-Rees Limited v. Anglo-Canadian Mortgage Corporation* (1912), 26 O.L.R. 490, affirmed.] — *See* JUDGMENT DEBTOR.

*Ramsden v. Dyson* (1866), L.R. 1 H.L. 129, followed.] — *See* IMPROVEMENTS.

*Regina v. Bell* (1884), 25 O.R. 272, 273, followed.] — *See* LIQUOR LICENSE ACT, 1.

*Regina v. Gordon* (1888), 16 O.R. 64, specially referred to.] — *See* CRIMINAL LAW, 3.

*Regina v. Justices of Middlesex* (1877), 2 Q.B.D. 516, applied and followed.] — *See* MAN-DAMUS.

*Regina v. McRae* (1897), 28 O.R. 569, specially referred to.] — *See* CRIMINAL LAW, 3.

- Regina v. Milne* (1875), 25 C.P. 94, specially referred to.]—See CRIMINAL LAW, 3.
- Rispin, Re* (1911), 25 O.L.R. 633, 636, followed.]—See WILL, 1.
- Rispin, In re, Canada Trust Co. v. Davis* (1912), 46 S.C.R. 649, followed.]—See WILL, 1.
- Robertson and Defoe, Re* (1911), 25 O.L.R. 286, discussed and distinguished.]—See DEED.
- Robinson v. Grand Trunk R.W. Co.* (1912), 26 O.L.R. 437, reversed.]—See RAILWAY, 2.
- Robinson v. Reynolds* (1912), 3 O.W.N. 1262, distinguished.]—See PRINCIPAL AND AGENT, 1.
- Rochester, Township of, and Township of Mersea, In re* (1901), 2 O.L.R. 435, considered.]—See MUNICIPAL CORPORATIONS, 1.
- Rodgers v. Hamilton Cotton Co.* (1893), 23 O.R. 425, followed.]—See MASTER AND SERVANT, 1.
- Rogers v. Hosegood*, [1900] 2 Ch. 388, followed.]—See DEED.
- Russell v. French* (1897), 28 O.R. 215, approved and followed.]—See MECHANICS' LIENS, 1.
- Russell v. Macdonald* (1888), 12 P.R. 458, distinguished.]—See EVIDENCE, 2.
- St. David's Mountain Spring Water Co. and Labey, Re* (1912), 4 O.W.N. 32, followed.]—See LANDLORD AND TENANT, 3.
- Scott v. London and St. Katherine Docks Co.* (1865), 3 H. & C. 596, 601, specially referred to.]—See NEGLIGENCE, 3.
- Sibbitt v. Carson* (1912), 26 O.L.R. 585, affirmed.]—See PRINCIPAL AND AGENT, 2.
- Simmons v. Liberal Opinion Limited, In re Dunn*, [1911] 1 K.B. 966, distinguished.]—See COMPANY, 1.
- Sirdar Gurdial Singh v. Rajah of Faridkote*, [1894] A.C. 670, followed.]—See WRIT OF SUMMONS.
- Standard Paint Co. v. Trinidad Asphalt Manufacturing Co.* (1911), 220 U.S. 446, followed.]—See TRADE-NAME.
- Stinson and College of Physicians and Surgeons of Ontario, Re* (1910-11), 22 O.L.R. 627, followed.]—See PHYSICIANS AND SURGEONS.
- Sutherland-Innes Co. v. Township of Romney* (1900), 30 S.C.R. 495, considered.]—See MUNICIPAL CORPORATIONS, 1.
- Taplin v. Barrett* (1889), 6 Times L.R. 30, followed.]—See PRINCIPAL AND AGENT, 3.
- Thomson's Estate, In re* (1879-80), 13 Ch.D. 144, 14 Ch. D. 263, followed.]—See WILL, 2.
- Toronto, City of, v. Foss* (1912), 27 O.L.R. 264, affirmed.]—See MUNICIPAL CORPORATIONS, 4.
- Toronto R.W. Co. v. Grinsted* (1895), 24 S.C.R. 570, followed.]—See RAILWAY, 1.
- Townsend v. Northern Crown Bank* (1912), 26 O.L.R. 291, affirmed.]—See BANKS AND BANKING, 2.
- Trustees Executors and Agency Co. v. Short* (1888), 13 App. Cas. 793, applied and fol-

lowed.]—See LIMITATION OF ACTIONS, 1.

*Unity Joint-Stock Mutual Banking Association v. King* (1858), 25 Beav. 72, followed.]

—See IMPROVEMENTS.

*Volcanic Oil and Gas Co. v. Chaplin* (1912), 27 O.L.R. 34, affirmed.] — See WATER AND WATERCOURSES, 1.

*Walker v. Smith* (1861), 29 Beav. 394, followed.]—See GIFT, 1.

*Wharton v. Masterman*, [1895] A.C. 186, followed.]—See WILL, 1.

*Wilkinson v. Alston* (1879), 41 L.T.R. 394, 48 L.J.Q.B. 733, explained and distinguished.]—See PRINCIPAL AND AGENT, 3.

*Wood v. Grand Valley R.W. Co.* (1912), 26 O.L.R. 441, affirmed with a variation.]—See CONTRACT.

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### CHALLENGE.

See CRIMINAL LAW, 4.

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### CHANNEL.

See CROWN.

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### COLLEGE OF PHYSICIANS AND SURGEONS.

See SURGEONS.

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### COMMISSION.

See PRINCIPAL AND AGENT—SOLICITORS.

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### COMPANY.

1. *Action against — Absence of Organisation—Legal Existence by Virtue of Letters Patent*

—*Companies Act—Authority of Solicitors to Defend Action—Powers of Directors—Costs.*]

The defendant, sued as a company, had been legally constituted a company by letters patent of Ontario dated the 27th October, 1910; but no steps were taken to organise it. A taxicab business was conducted under the company's name; but, so far as appeared, vehicles sent out in response to calls on the company were owned by V., who was one of the directors named in the charter. The plaintiff was injured by reason of the negligence of the driver of a taxicab called by the plaintiff from the garage ostensibly owned by the defendant; and the plaintiff sued the defendant for damages. The writ of summons was served upon V., and the action was defended, at the instance of V., by solicitors instructed by an indemnity company. The solicitors had no knowledge of the defects or omissions in the organisation of the company. The plaintiff recovered a judgment against the defendant; but, finding no assets to realise upon, moved to set aside the appearance and all subsequent proceedings, and for an order against the solicitors for payment of the plaintiff's costs, upon the ground that the defendant was non-existent. After the charter issued, nothing was done by the shareholders or directors until about the time of the application, when a meeting of the directors was held, and they ratified what had been done



in defending the action:—*Held*, that the charter had not become forfeited under the Companies Act by reason of the inaction; that the company was an existing legal entity, though with unused powers; that the directors had power to defend the action in the name of the company; that neither the company nor the plaintiff could raise any objection to the authority of the solicitors; and the application was dismissed.—Sections 16, 17, 18, and 21 of the Companies Act, 7 Edw. VII. ch. 34 (O.), considered. *Simmons v. Liberal Opinion Limited, In re Dunn*, [1911] 1 K.B. 966, distinguished. *Campbell v. Taxicabs Verralls Limited*, 141.

2. Winding-up—Petition for—Evidence in Support—Examination of Directors—Dominion Winding-up Act, secs. 134, 135—Practice of High Court—Con. Rules 489, 491, 492.]—In support of a petition for an order for the winding-up of a company under the Dominion Winding-up Act, R.S.C. 1906, ch. 144, it is competent for the petitioner to examine witnesses; and the directors of the company may be so examined.—No rules having been made under sec. 134 of the Act, sec. 135 introduces the practice of the High Court of Justice, as found in Con. Rules 489, 491, 492.—*Re Belding Lumber Co. Limited* (1911), 23 O.L.R. 255, specially referred to. *Re Baynes Carriage Co.*, 144.

See BANKS AND BANKING—

CONTRACT—EVIDENCE, 2—JUDGMENT DEBTOR—SOLICITORS.

### COMPENSATION.

See ANIMALS, 1—MUNICIPAL CORPORATIONS, 2.

### CONDITION.

See ASSESSMENT AND TAXES, 4—DEED.

### CONSTITUTIONAL LAW.

See ANIMALS, 1.—WATER AND WATERCOURSES, 2.

### CONTRACT.

*Subscription for Bonds of Railway Company—Undertaking to Construct Branch Line—Signature to Agreement—Liability of Company—Personal Liability of President—Money Paid on Faith of Undertaking—Non-performance—Damages—Remoteness—Assessment—Variation on Appeal—Nominal Damages.*]—*Held*, affirming the judgment of the trial Judge, MIDDLETON, J., 26 O.L.R. 441, that the defendant P., the president of the defendant company, as well as the company, was bound by the undertaking to provide railway connection contained in the document signed by him for the company, and was personally liable for its breach.—*Held*, also, that the proximate consequence of the breach of the undertaking was within the contemplation of the parties—a loss of benefits in the transaction of business in the village in which the plaintiffs re-

sided or did business; and the damages arising from that loss were not too remote nor indirect.—*Chaplin v. Hicks*, [1911] 2 K.B. 786, specially referred to.—*Held*, also, that there should be a variation in the trial Judge's assessment of the damages sustained by the several plaintiffs, those who were not directly interested as manufacturers being allowed only nominal damages. *Wood v. Grand Valley R.W. Co.*, 556.

See AUTHOR — BANKS AND BANKING, 2—CARRIERS — MECHANICS' LIENS—PRINCIPAL AND AGENT—RAILWAY, 2 — VENDOR AND PURCHASER—WATER AND WATERCOURSES, 2 — WRIT OF SUMMONS.

### CONTRIBUTORIES.

See BANKS AND BANKING, 3.

### CONTRIBUTORY NEGLIGENCE.

See MASTER AND SERVANT, 1—NEGLIGENCE, 2.

### CONVICTION.

See CRIMINAL LAW—LIQUOR LICENSE ACT—MANDAMUS.

### COSTS.

*County Court Action—Alternative Money Claims—Payment of Money into Court—Acceptance in Satisfaction of Smaller Claim—Scale of Costs—Con. Rule 425—“Satisfaction of all the Causes of Action”—Estoppel—Res Judicata — Appeal—Election—Terms—New Action.*]—In an action in a County

Court, the plaintiffs claimed \$504.29, the amount of an open or stated account; and, in the alternative, \$180.29, the amount of two promissory notes made by the defendant, and, with a third note, offered to the plaintiffs in settlement of the account. There was a dispute as to whether the plaintiffs had accepted the notes. The defendant brought into Court \$180.29 and interest, and said that it was sufficient to satisfy the plaintiffs' claim. The plaintiffs notified the defendant that they accepted the sum paid into Court in satisfaction of their alternative claim; and, taking the money out of Court, proceeded to tax costs. These were taxed by the clerk on the County Court scale; and that was affirmed on appeal to the County Court Judge. Subsequently the plaintiffs brought another action to recover the amount of the third promissory note:—*Held*, on appeal, from the order of the Judge, that two causes of action were included in the first action, and satisfaction of one cause of action was not “satisfaction of all the causes of action,” within the meaning of Con. Rule 425.—*Held*, also, that the claim for \$504.29 could not be said to be at an end so that estoppel or *res judicata* would be an answer if it was again set up.—*Coote v. Ford*, [1899] 2 Ch. 93, 99, followed.—And *held*, therefore, that the plaintiffs should be at liberty to elect one of two courses: (1) they might accept the money taken out of Court in

full satisfaction of their claims, and hold their judgment with County Court costs up to judgment, but must pay to the defendant his costs of the appeal from the taxation and of this appeal, and dismiss their second action with costs; or (2) they must be considered as not having brought themselves within Con. Rule 425, and must repay the money into Court with interest, and pay the defendant his costs of taxation and of the two appeals. *Frost and Wood Co. v. Leslie*, 450.

See ASSESSMENT AND TAXES, 4  
— COMPANY, 1 — DIVISION  
COURTS, 2—EVIDENCE, 1—PHY-  
SICIANS AND SURGEONS—SOLICI-  
TORS.

### COUNTY COURT JUDGE.

See CRIMINAL LAW, 1—LAND-  
LORD AND TENANT, 3.

### COUNTY COURTS.

See COSTS.

### COURT OF APPEAL.

See CRIMINAL LAW, 1, 4.

### COURT OF REVISION.

See ASSESSMENT AND TAXES.

### COURTS.

See DIVISION COURTS.

### COVENANT.

See DEED — LANDLORD AND  
TENANT, 1, 2.

### CRIMINAL LAW.

1. *Burglary and Theft*—Trial

*of two Prisoners together*—*Con-  
viction by County Court Judge*  
—*Leave to Move for New Trial*  
—*on Weight of Evidence*—“*Ver-  
dict*” of Judge—*Criminal Code*,  
sec. 1021—*Jurisdiction of Court*  
—*of Appeal*—*New Trial Granted*  
—*to one Prisoner only*—*Effect as*  
—*to the other*—*Evidence*—*Posses-  
sion of Stolen Money without*  
—*Explanation.*]—An application  
for a new trial, with the leave of  
the trial Judge, may be made  
to the Court of Appeal, under  
sec. 1021 of the Criminal Code,  
although the “verdict” is that  
of a Judge, and not of a jury.  
“Verdict” usually means the  
finding of a jury; but, the other  
words of sec. 1021 being general,  
an implied limitation cannot be  
rested upon the word “verdict”  
alone.—The two prisoners were  
tried together in a County Court  
Judge’s Criminal Court, for  
burglary and theft; both were  
convicted; and, by leave of the  
Judge, they both moved for a  
new trial, under sec. 1021, upon  
the ground that the verdict or  
finding was against the weight  
of evidence:—*Held*, that the ver-  
dict against the prisoner F. was  
contrary to the weight of evi-  
dence, and that he should have  
a new trial; but not so the de-  
fendant M.—The cases of the  
two had to be considered separ-  
ately; and it did not follow that,  
because the weight of evidence  
was in favour of one, there  
should be a new trial as to both.  
—The contention that possession  
of recently stolen money, with-  
out explanation, is no evidence



of guilt, though it would be as to goods of any other description, is too broad. It is a question of fact, governed by all the circumstances of the case. *Rex v. Murray and Fairbairn*, 382.

2. *Perjury—Tribunal before which Offence Committed—Registrar under Manhood Suffrage Registration Act—Irregularity of Appointment—Tribunal de Facto*—"Judicial Proceedings"—*Criminal Code*, sec. 171.]—The regularity and legality of the appointment of M. to act as a Registrar under the provisions of the Manhood Suffrage Registration Act, 7 Edw. VII. ch. 5, being disputed:—*Held*, nevertheless, that he was *de facto* a Registrar; that the proceedings before him were "judicial proceedings," within the meaning of sec. 171 of the Criminal Code; and that the defendants might properly be convicted of perjury in respect of oaths taken before him in those proceedings.—*Drew v. The King* (1903), 33 S.C.R. 228, followed. *Rex v. Mitchell*, *Rex v. West*, 615.

3. *Police Magistrate—Jurisdiction—Summary Trial for Theft—Case Begun before one Magistrate and Continued before another—Criminal Code*, secs. 668, 708—*Police Magistrates Act*, 10 Edw. VII. ch. 36, secs. 10, 18, 34 (O.)—*Prohibition—Acquittal of Defendant—Application before Certificate of Acquittal Issued—Status of Informant as Applicant—Duty of Magistrate, after Service of No-*

*tice of Motion—Adjournment of Hearing—County Crown Attorney—Conduct of.*]—An information was laid by H. before the Police Magistrate for the City of S., charging R. with the theft of a horse. A warrant was issued, and R. was brought before the said Police Magistrate; R. was admitted to bail and directed to appear for trial before the Police Magistrate for the Town of St. M., in the same county as the City of S. R. went before the Police Magistrate at St. M., surrendered himself into custody on the charge, pleaded "not guilty," and elected to be summarily tried by that magistrate. The informant objected, and his counsel attended and protested against the assumption of jurisdiction. The informant had been served with a subpoena to attend, but failed to do so. The magistrate proceeded with the trial; and, though served with a notice of motion for prohibition, acquitted R.:—*Held*, reversing the order of SUTHERLAND, J., in Chambers, refusing prohibition, that sec. 708 of the Criminal Code does not apply to a summary trial for an indictable offence.—2. That sec. 668 of the Code does not purport to confer jurisdiction, and must be confined to cases in which the accused is rightly before the Justice.—3. That no statute authorised the course pursued, and the question arising upon the motion must be decided upon general principles.—4. Having regard to the statute relating to



Police Magistrates, 10 Edw. VII. ch. 36, secs. 10, 18, 34(O.), that a magistrate has no power, once he has undertaken a case, to discharge himself, save in the case of illness or absence; he has no power to request another magistrate to sit for him; and, if once he acts, he must continue to the end.—*Regina v. Milne* (1875), 25 C.P. 94, *Regina v. Gordon* (1888), 16 O.R. 64, and *Regina v. McRae* (1897), 28 O.R. 569, specially referred to.—5. That prohibition may be granted at the very latest stage, as long as there is anything to prohibit; and here, although the magistrate had acquitted, he might still grant a certificate of acquittal; and, therefore, prohibition might yet be awarded.—*In re Brazill v. Johns* (1893), 24 O.R. 209, and *Mayor, etc., of London v. Cox* (1867), L.R. 2 H.L. 239, 254, followed.—6. *Semble*, that the magistrate, having been served with the notice of motion for prohibition, should have enlarged the hearing until the question of jurisdiction had been determined—there being no power in the Court to stay proceedings in the inferior Court pending the hearing of the motion.—7. That the informant had a *locus standi* as an applicant for prohibition.—8. Remarks upon the conduct of the County Crown Attorney in the various proceedings.—Order of SUTHERLAND, J., reversed. *Re Holman and Rea*, 432.

4. *Procedure at Trial—Jurors—Interest or Bias—Right of De-*

*endant to Challenge for Cause—Time for Challenge—Refusal of Right—Error or Misunderstanding—Jurisdiction of Court of Appeal—Stated Case.*]—At the opening of the trial of the defendant for arson, before a County Court Judge and a jury, the defendant's counsel said to the Judge that, before the jurors were called, he would like to ask each of them whether they were interested in a certain mutual fire insurance company, saying that, if any were, they would not be eligible. The Judge answered, "We will see when the question arises." The jurors were then called, and the defendant's counsel challenged five peremptorily, but none for cause. The jury was empanelled and sworn; and the defendant's counsel then asked the Judge "to see if any of the jury are interested" in the company; but the Judge said that it was too late to challenge for cause, and, the trial proceeding, the defendant was found "guilty:—" *Held* (MEREDITH, J.A., dissenting), upon a case stated by the Judge, that the defendant had not been refused the right to challenge for cause; that the first application of the defendant's counsel was premature, and the second was too late; and that the Court had no authority or jurisdiction to intervene in a case of error or misunderstanding.—*Per* MEREDITH, J.A.:—What took place deprived the prisoner of the right of challenge

for cause; what the Judge said was the cause of that deprivation; and so what took place amounted to a substantial refusal of the right of challenge for cause. *Rex v. Pilgar*, 337.

See LIQUOR LICENSE ACT—  
MANDAMUS.

### CROPS.

See LANDLORD AND TENANT, 2.

### CROWN.

*License of Occupation of Lands Covered by Water—Fishes—Lands Included in Prior Grant—Description—Island in Navigable River—Area of Lands Granted—Adjacent Marshes—Ambiguous Description—Evidence to Identify Subject of Grant—Admissibility—“Channel,” Meaning of—Boundary—Channel-bank—Misrepresentation by Licensee—Suppression of Material Facts—Fraud—Presumption—1 Geo. V. ch. 5—Cancellation of License—Parties—Attorney-General.]*—In 1827, the Crown issued to P. a license of occupation for an island in the Detroit river called “Fighting Island,” “containing by computation about twelve hundred acres.” In 1863, an order in council was passed accepting a surrender of the island to the Crown by the Wyandotte Indians; and on the 28th June, 1867, a patent of the island from the Crown to P. was issued, expressing that, in consideration of \$6,000 paid by P. to the Superintendent of Indian Affairs,

Her Majesty had granted to P., his heirs and assigns, forever, the island in the Detroit river known as “Fighting Island,” as shewn on a plan of record in the Crown Lands Department, and described, by the surveyor who made the plan, as lying between two lines extending from a point on the north nearly opposite Turkey creek to a point on the south nearly opposite the mouth of the Rivière aux Canards—the line forming the easterly boundary following the westerly side of the Canadian channel along its windings, and the line forming the westerly boundary following similarly the easterly side of the American channel. On the plan referred to, the island was marked as containing 90.9 acres. The plan also indicated a marsh surrounding the island proper; the total area of marsh and island shewn on the plan being 1,350 or 1,400 acres:—*Held*, that the description was not plain and unambiguous in its terms, but contradictory: the grant purported to be of an island shewn on a plan, but, by the reference to physical features, much more than the island shewn on the plan was described; and, therefore, the correspondence leading up to the grant and the circumstances attending the grant were admissible in evidence to prove what was in fact the subject of the sale—not to alter the contract, but to identify its object; any expression involving repugnancy to or inconsistency with the rest

of the instrument might be modified to the extent of removing that repugnancy or inconsistency; and loose and general words in the description yielded to particular and specific words therein.—*Gordon-Cumming v. Houldsworth*, [1910] A.C. 537, 541, and *Grey v. Pearson* (1857), 6 H.L.C. 61, 106, followed.—And *held*, upon the evidence, that the area granted by the patent was not merely the 90.9 acres called on the plan “Fighting Island,” but a much larger area, including that island as shewn on the plan, and at least the marshes surrounding it.—*Held*, also, that the word “channel” was used in the description to designate the deeper parts of the Detroit river most convenient as tracks for shipping; that there were two such channels, one on each side of the island; and that there was no difference in meaning between “bank of a channel” and “side of a channel,” or between “channel-bank” and “channel-side,” when used to define a boundary in the same locality.—*Held*, also, that the description in the grant to P. included the land covered by water in possession of the defendant G. under a license of occupation from the Provincial Government, used by G. as a fishery, and claimed by the plaintiff as the successor in title of P.—*Held*, also, that, in obtaining the license, G. perpetrated a deliberate fraud, by gross misrepresentation and the suppression of material facts.—*Held*, also, that the statute re-

garding presumptions in grants from the Crown, 1 Geo. V. ch. 5, did not assist G.; for the grant to P. was not a matter of presumption, but of fact, supported by the attending circumstances; and, even if the Crown had not granted to P. the island as far as the channel-bank, the license to G. should, on other grounds, be set aside.—*Held*, therefore, following *Martyn v. Kennedy* (1853), 4 Gr. 61, and *Florence Mining Co. v. Cobalt Lake Mining Co.* (1909), 18 O.L.R. 275, that, though the Attorney-General was not a party to the action, G.’s license of occupation, having been procured by fraud, should be declared cancelled and void. *Bartlet v. Delaney*, 594.

See WATER AND WATER-COURSES, 1.

### CROWN COUNTY ATTORNEY.

See CRIMINAL LAW, 3.

### DAMAGES.

*Personal Injuries — Assessment of Damages by Trial Judge — Appeal — Reduction of Amount Assessed.*] — The amount of the plaintiff’s damages for personal injuries sustained by reason of the negligence of the defendants, assessed at \$12,500 by RIDDELL, J., whose judgment (24 O.L.R. 84) was affirmed by a Divisional Court (25 O.L.R. 137), was reduced by the Court of Appeal to \$10,000; MEREDITH, J.A., dissenting.—*Per* GARROW, J.A.:—A finding as to damages can stand



upon no other footing than any other finding made by a Judge trying the case without a jury; the Court has the power to interfere and it is its duty to interfere with the finding where it is erroneous; there is a difference between a finding by a Judge and a finding by a jury.—*Jones v. Hough* (1879), 5 Ex. D. 115, 122, followed.—Discussion of the evidence and the proper measure of damages.—*Philips v. South Western R.W. Co.* (1879), 4 Q.B.D. 506, 5 Q.B.D. 78, specially referred to. *Bateman v. County of Middlesex*, 122.

See ANIMALS, 1—AUTHOR—CONTRACT—LANDLORD AND TENANT, 1—RAILWAY, 1—SLANDER—VENDOR AND PURCHASER—WATER AND WATERCOURSES, 1.

### DEATH.

See NEGLIGENCE, 1.

### DEBTOR AND CREDITOR.

See BANKS AND BANKING, 1—ESTOPPEL—GIFT, 2.

### DECLARATORY JUDGMENT.

See MUNICIPAL CORPORATIONS, 3.

### DEED.

*Conveyance of Land—Building Restriction—Construction—Covenant or Condition—Enforcement by Owner of other Land afterwards Conveyed by same Vendor* — “*Detached Dwelling-house*” — *Apartment House—Injunction.*—The de-

fendant, being the owner of lot 32 upon a certain avenue in a city, proposed to erect thereon a six-suite apartment house. In the deed of lot 32 by the executors of the original owner who laid out the avenue, to the defendant's predecessor in title, the following words followed the description of the lot—“to be used only as a site for a detached brick or stone dwelling-house, to cost at least two thousand dollars, to be of fair architectural appearance, and to be built at the same distance from the street line as the houses on the adjoining lots.” The deed also contained the ordinary covenants and a special covenant by the grantee not to erect or maintain upon the land any building for manufacturing purposes, etc.:—*Held*, that the provision above quoted was a covenant, notwithstanding its form, and notwithstanding the expressing of another prohibition in the regular form of a covenant. The maxim *expressio unius est exclusio alterius* did not apply.—*Held*, also, that the plaintiff, who bought other land upon the same avenue from the owners, after the deed under which the defendant claimed could take advantage of the covenant.—*Rogers v. Hosegood*, [1900] 2 Ch. 388, and *Formby v. Barker*, [1903] 2 Ch. 539, followed.—*Held*, also (BRITTON, J., dissenting), that the apartment house which the defendant proposed to erect was not “a detached dwelling-house,” within the meaning



of the covenant; and the defendant should be enjoined from erecting it.—*Re Robertson and Defoe* (1911), 25 O.L.R. 286, discussed and distinguished.—Judgment of MIDDLETON, J., reversed. *Pearson v. Adams*, 87.

See GIFT, 1.

## DEFAMATION.

See SLANDER.

## DIRECTORS.

See COMPANY, 1—JUDGMENT DEBTOR—SOLICITORS.

## DISCHARGE OF MORTGAGE.

See LIMITATION OF ACTIONS, 2.

## DISCRETION.

See DIVISION COURTS, 2—MUNICIPAL CORPORATIONS, 3—WILL, 1—WRIT OF SUMMONS.

## DISTRICT COURT JUDGE.

See ASSESSMENT AND TAXES, 1.

## DIVISION COURTS.

1. *Increased Jurisdiction* — *Division Courts Act*, 10 Edw. VII. ch. 32, sec. 62—*Ascertainment of Defendant's Liability and Amount thereof*—*Proof of Document*—*Proof of Title*—*"Other and Extrinsic Evidence."*—Section 62 of the *Division Courts Act*, 10 Edw. VII. ch. 32, provides that a Division Court "shall have jurisdiction in . . . (d) an action for the recovery of a debt or money demand where the amount

claimed, exclusive of interest . . . does not exceed \$200 and the amount claimed is (i) ascertained by the signature of the defendant . . . An amount shall not be deemed to be so ascertained where it is necessary for the plaintiff to give other and extrinsic evidence beyond the production of a document and proof of the signature to it:"—*Held*, that, in making the provision contained in the last clause, it was the ascertainment of the defendant's liability under a document and the amount of such liability that the Legislature had in view, and not the matter of the plaintiff's interest in or right to the document by which the liability is ascertained.—*Held*, therefore, that the jurisdiction of the Division Court was not ousted because the plaintiff, in an action to recover \$200 and interest upon a covenant in a mortgage-deed executed by the defendant, had to establish by other than documentary evidence his right to sue upon the covenant, notwithstanding that he had assigned the mortgage. *Renaud v. Thibert*, 57.

2. *Want of Territorial Jurisdiction*—*Motion for Prohibition*—*Applicant's Default and Delay*—*Failure to Explain*—*Absence of Prejudice*—*Discretion*—*Refusal of Motion*—*Costs.*—An action for the price of goods sold and delivered was brought in a Division Court which had no territorial jurisdiction. The

defendant filed a notice disputing the jurisdiction; but did not attend at the trial; and judgment was given for the plaintiff. The defendant moved in the Division Court for a new trial; his application was dismissed because it was made too late. He then moved for prohibition; but, in his affidavit in support of the application, did not explain or excuse his default and delay, and did not disclose the nature of his defence, merely saying that he had a good defence upon the merits:—*Held*, that prohibition should not be granted.—Where a defendant does not attend at the trial of an action for the purpose of upholding his contentions, and where it is not made clearly to appear that any injustice will be done by allowing the judgment to stand, prohibition should not be granted.—*Mayor, etc., of London v. Cox* (1867), L.R. 2 H.L. 239, 283, followed.—The practice of suing in a Division Court which is known to have no jurisdiction, is not one that should be encouraged; and the motion for prohibition was dismissed without costs. *Re Canadian Oil Companies v. McConnell*, 549.

*See* MANDAMUS.

### DIVISIONAL COURTS.

*See* LANDLORD AND TENANT, 3  
—PHYSICIANS AND SURGEONS.

### DOCUMENTS.

*See* EVIDENCE, 2.

### DOG.

*See* ANIMALS, 1.

### DOMICILE.

*See* WRIT OF SUMMONS.

### DRAINAGE.

*See* MUNICIPAL CORPORATIONS, 1.

### EJECTMENT.

*See* LANDLORD AND TENANT, 3  
—LIMITATION OF ACTIONS.

### ELECTION.

*See* BANKS AND BANKING, 3—  
COSTS.

### EMBLEMENTS.

*See* LANDLORD AND TENANT, 2.

### ENCROACHMENT.

*See* WATER AND WATER-COURSES, 1—WILL, 1, 2.

### ESTOPPEL.

*Representing Person as Wife* —*Goods Supplied by Tradesmen on Credit* —*Liability* —*Credit, to whom Given.*]—Where a man represents a woman to be his wife, and a third party acts upon that representation, the man is estopped from saying that she is not his wife.—Review of the authorities.—The plaintiffs supplied articles of attire, suitable to her apparent station in life, to the defendant Z., upon credit, believing her to be the wife of the defendant I., who introduced her as such to them:—*Held*, that, as there was nothing in the evidence to indicate

that the defendant Z. was buying or the plaintiffs selling on any but the credit of L., the defendant Z. was not liable.—The fact that the goods were charged in the plaintiffs' books to the defendant Z., under the name of "Mrs. L.," did not, upon the evidence, assist in shewing that the woman was the person credited. *Redferns Limited v. Inwood*, 213.

See BANKS AND BANKING, 3—  
COSTS—IMPROVEMENTS—MUNICIPAL CORPORATIONS, 5.

### EVIDENCE.

1. *Witnesses Entitled to Give Opinion Evidence*—"Expert"—*Evidence Act*, 9 Edw. VII. ch. 43, sec. 10 (O.)—*Exceeding Number of Witnesses Allowed—Disregard of Statute—Mistrial—New Trial—Costs.*]—In an action to recover a balance of the contract-price for the building of a silo, the defendant set up that the plaintiff did not build or complete the silo in accordance with the terms of the contract. At the trial, the defendant called six witnesses who testified as to the construction of the silo, two of whom he admitted to be experts:—*Held*, that the six witnesses were persons "entitled according to the law or practice to give opinion evidence," within the meaning of sec. 10 of the Evidence Act, 9 Edw. VII. ch. 43 (O.); and that the statute had been disregarded.—The meaning of the word "expert" considered.—

*Held*, also, that the mere refusal of the trial Judge to observe the plain provisions of the statute constituted a mistrial; and the plaintiff was entitled to a new trial, with costs of the last trial and appeal to be paid by the defendant. *Rice v. Sockett*, 410.

2. *Witnesses on Pending Motion—Production of Documents—Con. Rules 448 et seq.*, 490-492—*Company—Winding-up—Petition—Dismissal—Previous Decision.*]—It is the duty of a person under examination as a witness upon a pending motion to produce (if called upon) all books, papers, and documents which he would be bound to produce at the trial: *Con. Rules 448 et seq.*, 490, 491, 492.—Where a witness, put forward by a party to a proceeding, makes certain statements under oath, and it is desired to shew by his own books, or those of the person who puts him forward, that his statements are untrue, the books must be produced to test his accuracy; when he is under cross-examination, they will be used for that purpose, and to prove that his evidence is not to be relied upon. But where a party desires to obtain evidence upon a motion, and subpoenas a person to give it, he cannot compel him to produce books, etc., to add to what he is to say—or to enable him to become possessed of facts not within his knowledge.—*Alexander v. Irondale Bancroft and Ottawa R.W. Co.* (1898), 18 P.R. 20, *Russell v. Macdonald*

(1888), 12 P.R. 458, and *In re Emma Silver Mining Co.* (1875), L.R. 10 Ch. 194, distinguished.—*Re Baynes Carriage Co.* (1912), 27 O.L.R. 144, is decisive against a motion to dismiss the petition for the winding-up of the company, and of the right to examine the witnesses sought to be examined in support of the petition. *Re Baynes Carriage Co.*, 244.

See ANIMALS, 2—ASSESSMENT AND TAXES, 4—BANKS AND BANKING, 3—COMPANY, 2—CRIMINAL LAW, 1—CROWN—DIVISION COURTS, 1—GIFT—LANDLORD AND TENANT, 3—LIMITATION OF ACTIONS, 2—MASTER AND SERVANT—NEGLIGENCE, 3—RAILWAY, 3—SOLICITORS—WATER AND WATERCOURSES, 2, 3.

### EXAMINATION OF OFFICER OF COMPANY.

See JUDGMENT DEBTOR.

### EXECUTION.

*Interest of Certificated Holder of Mining Claim before Patent—Liability to Seizure and Sale—Mining Act of Ontario, 1908—Execution Act, 9 Edw. VII. ch. 47—2 Geo. V. ch. 8, sec. 7(O.)*—The interest of the holder of an undivided share in a mining claim, for which a certificate of record has been issued, but for which the purchase-money has not been paid and the patent has not been issued or applied for, is not exigible, or was not before the en-

actment of 2 Geo. V. ch. 8, sec. 7(O.)—Provisions of the Mining Act of Ontario, 8 Edw. VII. ch. 21, and of the Execution Act, 9 Edw. VII. ch. 47, considered; and the authorities reviewed.—Decision of the Mining Commissioner affirmed. *Re Clarkson and Wishart, 70.*

### EXEMPTION.

See RAILWAY, 2.

### EXPERT EVIDENCE.

See EVIDENCE, 1.

### EXPRESS COMPANY.

See CARRIERS.

### EXPROPRIATION.

See MUNICIPAL CORPORATIONS, 2.

### FACTORIES ACT.

See MASTER AND SERVANT, 1.

### FISHERIES.

See CROWN.

### FORUM.

See ASSESSMENT AND TAXES, 1—WRIT OF SUMMONS.

### FRAUD.

See CROWN.

### FRAUDULENT CONVEYANCE.

*Husband and Wife—Voluntary Settlement—Solvency of Husband—Hazardous Business—Fear of Future Creditors—Intent—13 Eliz. ch. 5—Findings of Trial Judge—Appeal.*—



*Held*, upon the evidence, reversing the decision of a Divisional Court, 24 O.L.R. 591, restoring that of MULOCK, C.J.Ex.D., *ib.*, and agreeing with the dissenting opinion of FALCONBRIDGE, C.J. K.B., in the Divisional Court, that the voluntary conveyance made by the defendant M. to his wife, in view of the hazardous business into which he had entered, was fraudulent and void against the plaintiffs and other creditors of M.—*Per* GARROW, J.A.:—A voluntary conveyance made with intent to affect future creditors alone is within the statute 13 Eliz. ch. 5, and will be set aside.—*Mackay v. Douglas* (1872), L.R. 14 Eq. 106, specially referred to.—*Per* MEREDITH, J.A.:—The conveyance was made for the purpose of securing the property comprised in it against the grantor's creditors; to preserve it against the losses he might incur in the hazardous venture upon which he had entered. Much weight should be attached to the findings of the trial Judge in such a case as this, in which, having the advantage of seeing and hearing the witnesses and all other advantages of a trial Judge, he discredits the defendants in their testimony on the question of the *bona fides* of the transaction. *Ottawa Wine Vaults Co. v. McGuire*, 319.

#### GIFT.

1. *Deed of Land—Parent and Child — Absence of Undue Influence—Action by Administra-*

*trix of Mother to Set aside Deed — Evidence — Testimony of Donee — Settlement — Affirmance — Will — Failure to Prove — Revocation of Letters of Administration — Jurisdiction.*]—In February, 1907, a conveyance of land was made to the defendant by her mother, who died in March, 1911. On the same day that the deed was executed, the mother made a will by which she gave all her estate to the defendant. This will was never revoked, but it was not proved, and letters of administration to the estate of the mother were granted to the plaintiff, who brought this action to set aside the deed. The mother had lived with the defendant for some years before the will was made and so continued until her death:—*Held*, upon the evidence, independently of the defendant's own testimony, that the execution of the deed was the free act of the mother; that there was no undue influence by the daughter; that the mother intended by the deed to compensate the daughter for her trouble and care; that it was a fair and reasonable settlement; and that it was too late to attack it after she had affirmed it by continuing to live with the defendant for four years after its execution.—*Walker v. Smith* (1861), 29 Beav. 394, followed as to not taking into account the testimony of the recipient of a gift.—*Semble*, that the letters of administration might be recalled and the will admitted to

probate; but the High Court had no jurisdiction to revoke the grant.—*McPherson v. Irvine* (1895), 26 O.R. 438, referred to. *Taylor v. Yeandle*, 531.

2. *Money in Savings Bank — Direction of Customer to Allow Daughter to Draw — Money Placed by Bank in Joint Account — Evidence — Ratification — Survivorship — Relationship of Bank to Customer—Debtor and Creditor — Trust—Failure to Establish — Will — Testamentary Capacity.*— The testatrix, being ill, signed a written direction to a bank, in which she had money to her credit, in a savings bank account, to “arrange my money in E. D.’s name so she can draw it.” She gave this to E. D., her daughter, who took it to the bank; and the accountant changed the heading of the account so as to make it a joint account of the testatrix and E. D. or either. This was in August, 1911. Before the death of the testatrix, both she and her daughter drew money from the account upon their respective receipts; and after the death, which occurred in February, 1912, the daughter had what remained of the money transferred by the bank to her sole account. Under the will of the testatrix, the daughter took nothing. The executor sued E. D. and the bank for the money transferred; and she set up as defences: (1) that the money was held in trust

for her by her mother; (2) that, according to the arrangement with the bank, ratified by her mother, she was entitled to the money by survivorship; and (3) that the mother was mentally incapable of making a will:—*Held*, upon the evidence, that E. D. had not succeeded in establishing the alleged trust nor the want of testamentary capacity.—And *held*, that the arrangement made with the bank and what took place between the testatrix and E. D. did not shew a gift of the money to E. D.; it was intended to be placed in her name merely for the convenience of the testatrix, whose money it remained; what was done by the bank in putting the money to a joint account was not ratified by the testatrix; there was no right of survivorship; and E. D. and the bank were liable to the executor for the money transferred.—Review of the authorities.—*Held*, also, that the relationship of bank and customer is not that of trustee and *cestui que trust*, but that of debtor and creditor.—*Foley v. Hill* (1848), 2 H.L.C. 28, 36, followed.—Judgment of KELLY, J., affirmed. *Everly v. Dunkley*, 414.

See WILL.

## HIGH COURT OF JUSTICE.

See GIFT, 1—MANDAMUS.

## HIGHWAY.

*Obstruction—Act of Stranger—Liability of Municipal Cor-*

poration—*Injury to Traveller*—*Nonrepair* — *Municipal Act, 1903, sec. 606*—*Action—Time-limit—Stated Case.*]—A case was stated for the opinion of the Court upon a question of law arising in an action for damages for injuries sustained by the plaintiff by coming in contact with a telephone pole placed upon the highway by a telephone company:—*Held*, that there is no liability upon a municipality arising from the placing of obstructions upon a highway by a third person, save the liability arising from the failure to repair imposed by sec. 606 of the Municipal Act, 1903; and the plaintiff's right of action, of any, was barred by reason of the action not having been brought within three months.—*Per RIDDELL, J.*:—The stated case did not contain any allegation of an act or omission of the defendants which resulted in or allowed the erection of the offending pole; and so no cause of action appeared.—*Judgment of MIDDLETON, J.*, affirmed. *Howse v. Township of Southwold*, 29.

See MUNICIPAL CORPORATIONS,  
2—WATER AND WATERCOURSES,  
1.

### HUSBAND AND WIFE.

See ESTOPPEL — FRAUDULENT  
CONVEYANCE.

### IMPROVEMENTS.

*Lien on Land for—Increased  
Selling Value — Expenditure*

*Made upon Faith of Owner's  
Intention to Give Land to Im-  
prover—Estoppel — Enforce-  
ment of Lien—Possession—Sale  
upon Default of Payment.*]—A person who has expended money for the benefit of another, or on property in which he has no interest, has, as a rule, no lien in respect of such expenditure against such other person or against the owner of the property. But to this general rule there is an exception, based upon the principle of estoppel: where the owner of property stands by and allows a person to spend money thereon in the expectation that he will receive the benefit of it, such person is entitled to a lien for the increased value resulting from such expenditure; and the same principle applies where the expenditure is made upon the faith of a statement by the owner of his intention to give the land to the person making the improvement.—*Unity Joint-Stock Mutual Banking Association v. King* (1858), 25 Beav. 72, *Plimmer v. Mayor, etc., of Wellington* (1884), 9 App. Cas. 699, and *Ramsden v. Dyson* (1866), L.R. 1 H.L. 129, followed.—This last-mentioned principle was applied in favour of a defendant in an action by his mother's administrator to recover possession of a farm, where the defendant's mother had encouraged him to improve the farm by telling him that he would ultimately have the benefit of his labour and expenditure.—The defendant was

*held*, entitled to enforce his lien, not by retaining possession of the farm, but by sale upon default of payment within a limited time of the amount found due for improvements.—In estimating the amount, the defendant was allowed only for permanent improvements which had increased the selling value. *McBride v. McNeil*, 455.

See ASSESSMENT AND TAXES, 4.

### INDIAN LANDS.

See ASSESSMENT AND TAXES, 4.

### INFANT.

See NEGLIGENCE, 2.

### INFORMATION.

See LIQUOR LICENSE ACT, 1—MANDAMUS.

### INJUNCTION.

See AUTHOR—DEED — TRADE-NAME — WATER AND WATERCOURSES, 1.

### INCREASED JURISDICTION.

See DIVISION COURTS, 1.

### INQUIRY.

See PHYSICIANS AND SURGEONS.

### INSOLVENCY.

See BANKS AND BANKING, 2—COMPANY, 2—FRAUDULENT CONVEYANCE.

### INTEREST.

See BANKS AND BANKING, 1.

### INTERLOCUTORY ORDER.

See JUDGMENT DEBTOR.

### INTERNATIONAL BOUNDARY.

See WATER AND WATERCOURSES, 2.

### INTOXICATING LIQUORS.

See LIQUOR LICENSE ACT — MUNICIPAL CORPORATIONS, 3.

### JUDGMENT.

See MUNICIPAL CORPORATIONS, 3 — NEGLIGENCE, 3 — SUPREME COURT OF CANADA.

### JUDGMENT DEBTOR.

*Company — Examination of Director as Officer—Con. Rules 902, 910—Practice — Interlocutory Order—Appeal—Necessity for Leave.*]—*Held*, affirming the decision of RIDDELL, J., 26 O.L.R. 490, that a director is an officer of a company who may be examined under the provisions of Con. Rule 902.—Under that Rule, an examination can be had without an order.—And *held*, that, if there was any doubt about the correctness of the decision, the case was one in which an order for examination might well be made under Con. Rule 910.—*Seemle*, that the order of RIDDELL, J., was not in its nature final, but merely interlocutory, and no appeal lay without leave. *Powell-Rees Limited v. Anglo-Canadian Mortgage Corporation*, 274.

### JURISDICTION OF COURT OF APPEAL.

See CRIMINAL LAW, 1, 4.



**JURISDICTION OF DIVISION COURTS.**

See DIVISION COURTS — MAN-  
DAMUS.

**JURISDICTION OF HIGH COURT OF JUSTICE.**

See GIFT, 1—MUNICIPAL COR-  
PORATIONS, 3.

**JURISDICTION OF POLICE MAGISTRATE.**

See CRIMINAL LAW, 3.

**JURY.**

See CRIMINAL LAW, 4—MAS-  
TER AND SERVANT—NEGLIGENCE  
—RAILWAY, 1, 3—SLANDER.

**JUS PUBLICUM.**

See WATER AND WATERCOUR-  
SES, 2.

**LACHES.**

See BANKS AND BANKING, 3.

**LANDLORD AND TENANT.**

1. *Covenant by Tenant to Re-  
pair—Construction — Breach—  
Damages — Ordinary Wear and  
Tear.*—In an action by land-  
lord against tenant for breach  
of a covenant contained in an  
informal lease of a house and  
land, whereby the tenant, who  
was to receive the premises “in  
the best condition,” undertook  
“to give up the house in the  
same condition and repairs.”—  
*Held*, that, in computing the  
damages for the breach, an al-  
lowance should be made to the  
landlord for ordinary wear and  
tear; there was no warrant for

reading an exception into the  
undertaking.—*Lurcott v. Wake-  
ly & Wheeler*, [1911] 1 K.B.  
905, followed. *Bornstein v.  
Weinberg*, 536.

2. *Lease of Farm by Tenant  
for Life—Rights of Lessee and  
Remainderman at Death of Life-  
tenant—Crops in the Ground—  
Emblements — Manure and  
Straw—Covenant to Expend up-  
on Farm.*—A lease for five  
years of land in which the les-  
sor had a life estate only was  
*held* to have been put an end to  
by the death of the lessor dur-  
ing the term; but the wheat  
then sown and in the ground be-  
came emblements belonging to  
the lessee; and these being pur-  
chased from the lessee by the  
plaintiffs, the executors of the  
lessor, the defendant, the re-  
mainderman, became liable to  
them for their conversion.—Not  
so, however, the straw and man-  
ure on the farm at the deter-  
mination of the lease. By the  
terms of the lessee's covenant,  
these were to be kept and util-  
ised on and for the land, and  
were not the property of or re-  
movable by the lessee; the straw  
and manure, as “accessories of  
the soil,” passed to the remain-  
derman with the land freed  
from the demise.—Review of the  
authorities.—*Gardner v. Perry*  
(1903), 2 O.W.R. 681, not fol-  
lowed.—Judgment of the Coun-  
ty Court of the County of Sim-  
coe varied. *Atkinson v. Far-  
rell*, 204.

3. *Proceeding to Eject Over-*

*holding Tenant—Landlord and Tenant Act, 1 Geo. V. ch. 37, Part III.—Order of County Court Judge “Dismissing Application”—Refusal of Writ of Possession—Appeal under sec. 78 (1) — Termination of Tenancy—Conflicting Evidence — Duty of Judge—Refusal to Determine Question — Powers of Judge and of Divisional Court —Leave to Bring Action—Discharge of Order.]—After the termination of a tenancy, the landlords applied to a County Court Judge to make the inquiry provided for in sec. 75 of the Landlord and Tenant Act, 1 Geo. V. ch. 37, Part III., relating to overholding tenants. The Judge gave an appointment, all parties appeared, and, with their witnesses, were heard. The Judge made no specific finding; and, instead of issuing a writ of possession or specifically refusing to do so, made an order dismissing the application of the landlords:—*Held*, that the application to the Judge was in substance an application for a writ of possession; his refusal to decide was in effect a refusal of a writ of possession; and an appeal lay from his order to a Divisional Court under sec. 78 (1).—*Held*, also, that it is now competent for and the duty of the County Court Judge to determine the question of tenancy, and the termination of it; and this he may do on conflicting evidence. — *Re St. David’s Mountain Spring Water Co. and Lahey* (1912), 4 O.W.N.*

32, followed.—*Held*, also, that it is not for the County Court Judge to decide whether the right of the tenant should be determined under the Act (Part III.), but for the appellate (Divisional) Court: sec. 78 (2).—And *held*, upon the fact of this particular case, that the right to possession should not be determined in a proceeding taken under Part III.; and the order of the Judge should be discharged, and the landlords left to proceed by action for the recovery of possession.—Suggested, *per* LENNOX, J., that the right of refusal to proceed might well be conferred by the Legislature upon the County Court Judge. *Re Dickson Co. of Peterborough and Graham*, 239.

See LIMITATION OF ACTIONS, 2.

## LETTERS OF ADMINISTRATION.

See GIFT, 1.

## LICENSE.

See CROWN.

## LICENSEE.

See NEGLIGENCE, 1.

## LIEN.

See ASSESSMENT AND TAXES, 4 — BANKS AND BANKING, 1—IMPROVEMENTS — MECHANICS’ LIENS.

## LIMITATION OF ACTIONS.

1. Possession of Land—Successive Intruders—Break in Oc-

*cupation—Absence of Writing to Shew Transfer of Claim — Ejection—Proof of Plaintiff's Title.*]—Where in an action to recover possession of land, the defendant relies upon the Limitations Act and sets up the possession of himself and several prior intruders, it is not necessary for him to shew a conveyance or writing transferring the claim of one intruder to another; but he must clearly establish that these trespass occupants have followed each other in close succession, in an unbroken chain, the one coming in as soon as the other went out, during the time the statute was running.—If there has been any interval, during that interval the law refers the possession to the real owner having title. And, where there was a gap of a whole year, it was *held*, that the defence of the statute had not been made out.—*Trustees Executors and Agency Co. v. Short* (1888), 13 App. Cas. 793, and *Handley v. Archibald* (1899), 30 S.C.R. 130, applied and followed.—The plaintiff, having proved possession by his predecessor in title, had given sufficient *prima facie* evidence of a fee simple.—Judgment of the Judge of the County Court of the County of Halton affirmed. *Robinson v. Osborne*, 248.

2. *Recovery of Land—Possession — Evidence of Tenancy—Limitations Act — Mortgage — Registered Discharge — New Starting-point — Registry Act.*]

—The decision of a Divisional Court, 25 O.L.R. 379, was reversed, and the judgment of MULLOCK, C.J.Ex.D., *ib.*, was restored; MEREDITH, J.A., dissenting.—*Held, per Curiam*, that the occupancy of the defendant's husband began as a tenancy at will, which was never afterwards interrupted or changed, and that at the end of ten years from the end of the first year of the tenancy the statutory bar against the plaintiff was complete.—*Held*, also (MEREDITH, J.A., dissenting), that the discharge of the mortgage and its registration did not enure to the benefit of the plaintiff so as to give a new right of entry or starting-point under the statute.—Review of the authorities and consideration of the provisions of the Registry Act and the Limitations Act.—*Brown v. McLean* (1889), 18 O.R. 533, 535, approved.—*Per* GARROW, J.A.:—When the plaintiff obtained the discharge, he was a stranger to the estate, and had, therefore, no estate or interest to be enlarged by paying off the mortgage and obtaining a statutory discharge.—*Per* MEREDITH, J.A.:—The defendant, by length of possession of her husband, had ousted the plaintiff from and had acquired for her husband's heirs the equity of redemption of the land; the plaintiff had acquired, under the mortgage, in his own name, with his own money, and for his own benefit, the legal estate in the land, at the least; and so the

defendant was entitled, at most, only to redeem the land from him; and, consequently, the plaintiff was entitled to possession, which was all that he sought in the action. *Noble v. Noble*, 342.

See ASSESSMENT AND TAXES, 2, 4—HIGHWAY.

### LIMITATION OF LIABILITY.

See CARRIERS.

### LIQUIDATOR.

See BANKS AND BANKING, 3.

### LIQUOR LICENSE ACT.

1. *Amending Act*, 2 Geo. V. ch. 55, sec. 13—*Person Found Intoxicated in Municipality where Local Option By-law in Force*—"Public Place"—*Hotel*—*Conviction*—*Information*.]

An hotel is not a "public place," within the meaning of sec. 13 of 2 Geo. V. ch. 55, an Act to amend the Liquor License Act, providing that, in a municipality in which a local option by-law is in force, a person "found upon a street or in any public place in an intoxicated condition . . . shall be guilty of an offence. . . ."  
—*Regina v. Bell* (1884), 25 O. R. 272, 273, and *Case v. Story* (1869), L.R. 4 Ex. 319, followed.—A conviction under sec. 13 was quashed, because, as far as appeared, the only place where the defendant was found intoxicated was an hotel.—*Semble*, also, that the information disclosed no offence. *Rex v. Cook*, 406.

2. *Licensed Hotel-keeper*—"Disposal" of *Intoxicating Liquor on Sunday*—*Sec. 54 of Act*.]—A bottle of whisky was bought from the defendant, a licensed hotel-keeper, upon his premises, and paid for, on a Saturday before seven o'clock p.m., but was kept upon the premises until the following day, Sunday, and then delivered to the purchaser:—*Held*, that there was a "disposal" of the liquor on Sunday, contrary to sec. 54 of the Liquor License Act, R.S.O. 1897, ch. 245 (6 Edw. VII. ch. 47, sec. 13).—*Noblett v. Hopkinson*, [1905] 2 KB. 214, followed. *Rex v. Clark*, 525.

See MUNICIPAL CORPORATIONS, 3.

### LIVE STOCK.

See RAILWAY, 2.

### LOCAL IMPROVEMENTS.

See MUNICIPAL CORPORATIONS, 2.

### LOCAL OPTION BY-LAW.

See LIQUOR LICENSE ACT, 1—MUNICIPAL CORPORATIONS, 3.

### MAINTENANCE.

See WILL, 2.

### SLANDER.

See MALICE.

### MANDAMUS.

*Division Court*—*Appeal from*



*Magistrate's Conviction — Allowance upon Ground of Insufficiency of Information—Objection not Taken before Magistrate—Criminal Code, sec. 753 — Decision on Merits, not on Preliminary Point — Jurisdiction — Review of Decision — Reopening Appeal—Consent — Duty of High Court.*]—The Court will not make an order simply because all persons directly interested consent to such order or even ask for it.—The High Court of Justice may by mandamus command an inferior Court to hear a case within its jurisdiction; but where the inferior Court has decided a matter within its jurisdiction, however wrong the decision may be, mandamus does not lie to compel a reconsideration.—*In re Long Point Co. v. Anderson* (1891), 18 A.R. 401, 408, followed.—If the inferior Court determines a cause on a preliminary point without going into the merits, there is no real decision on the case, and mandamus will lie; but it must be clear that the point is preliminary in reality and not on the merits.—The defendant, who had been tried and convicted by a Police Magistrate for an offence against a statute, appealed to a Division Court, under sec. 749 (a) of the Criminal Code. The Judge presiding in the Division Court, upon objection taken by the appellant, allowed the appeal, on the sole ground that the information on which the conviction was based

was insufficient. No objection to the information had been taken before the magistrate. Section 753 of the Criminal Code expressly provides that no judgment shall be given in favour of the appellant upon an objection to the information and complaint not taken before the magistrate:—*Held*, that the Judge's decision was not on a matter preliminary, but on the legal merits; and, even if he misconstrued sec. 753, he was acting within his jurisdiction.—*The Queen v. Justices of Middlesex* (1877), 2 Q.B.D. 516, applied and followed.—A motion by the informant, upon the consent of the defendant and the Judge, for a mandamus to compel the Judge to reopen the appeal, was refused. *Re McLeod v. Amiro*, 232.

See MUNICIPAL CORPORATIONS, 3.

#### MANHOOD SUFFRAGE REGISTRATION ACT.

See CRIMINAL LAW, 2.

#### MANUFACTORY.

See MUNICIPAL CORPORATIONS, 4.

#### MARSH LANDS.

See CROWN — WATER AND WATERCOURSES, 3.

#### MASTER AND SERVANT.

1. *Injury to Servant—Negligence — Violation of Factories Act, R.S.O. 1897, ch. 256, sec. 20 (1)—Dangerous Machinery*

— *Absence of Guard—Finding of Jury—Inconsistency — Absence of Contributory Negligence — Evidence — Nonsuit — Voluntary Assumption of Risk — Application of Maxim “Volenti non Fit Injuria” to Breach of Statutory Duty.*—The plaintiff, a foreman employed by the defendants in their box factory, after repairing a driving belt, was in the act of applying belt dressing to the inner surface of the moving belt, when his clothing was caught by the head of a set screw which projected about an inch from the outer face of a collar or disc upon and near the end of a revolving shaft, and was thrown upon the shaft and pulley, and severely injured. To do this work the plaintiff had removed the covering which guarded the set screw, and gone into the pit or open space close by the pulley. In an action for damages for his injuries, the jury found: (1) that the defendants were guilty of negligence which occasioned the accident to the plaintiff, in not having the projecting set screw in the collar upon the shaft guarded otherwise than it was when the plaintiff was injured; (2) that the defendants were guilty of negligence in respect of not having a separate guard on the set screw or in not having a collar on the shaft with a counter-sunk set screw; also in not having proper appliances for applying belt dressing; (3) that the plaintiff, knowing the danger, voluntarily

undertook the risk; (4) that the plaintiff could not, by the exercise of reasonable care, have avoided the accident:—*Held*, by a Divisional Court, affirming the judgment of BRITTON, J., (1) that the jury's second finding was warranted by the evidence, and that finding, coupled with the admittedly dangerous character of the machinery, shewed a violation of sub-sec. 1 of sec. 20 of the Factories Act, R.S.O. 1897, ch. 256; (2) that, although there was strong evidence of contributory negligence, it was not so conclusive and undisputed as to warrant that question being withdrawn from the jury, nor could it be said that the finding against contributory negligence was perverse; and (3) that the maxim “*volenti non fit injuria*” is not applicable in relief of a defendant guilty of a violation of a statutory duty such as is imposed by the Factories Act.—*Baddeley v. Earl Granville* (1887), 19 Q.B. D. 423, and *Rodgers v. Hamilton Cotton Co.* (1893), 23 O.R. 425, followed.—*Groves v. Lord Wimborne*, [1898] 2 Q.B. 402, and *Butler v. Fife Coal Co.*, [1912] A.C. 149, specially referred to.—Upon an appeal to the Court of Appeal, the judgment of the Divisional Court was affirmed.—*Per* GARROW, J. A.:—The evidence of contributory negligence was not strong enough to justify withdrawing the case from the jury. The findings of the jury brought the case within the Factories

Act. A breach of a statutory duty is in itself actionable, as it is also evidence of negligence. It was impossible to say that there was no evidence upon which the jury might reasonably act in reaching the conclusion that the plaintiff had justified his conduct on the occasion in question, and that the guard, as to him, in the position in which he was, was insufficient. The circumstance that the plaintiff was the foreman in charge had not the effect of depriving him of the right to invoke the provisions of the Act. Nor was it a complete answer in itself to say that the defendants had supplied a sufficient guard when in place, if in fact the guard was not in place when the accident occurred. There was some doubt whether the jury were sufficiently instructed or sufficiently understood the question put to them as to the voluntary assumption of the risk. But, assuming that their finding that the plaintiff was *volens* should stand, it was not a good answer to the finding against the defendants of a violation of the Factories Act.—*Per* MEREDITH, J. A.:—The finding of the jury that the plaintiff voluntarily incurred the risk which caused his injury was inconsistent with the finding that the plaintiff was not guilty of contributory negligence. It being the fact that the plaintiff was not negligent in getting into the box to do the work, there was no evidence that he voluntarily incurred the

risk—he was doing that which it was his duty to do without incurring any greater risk than that duty made necessary. The case should be treated as if there was no finding of *volens*. Upon the jury's other findings, a clear case, under the Factories Act, was made against the defendants. *McClemont v. Kilgour Manufacturing Co.*, 305.

2. *Injury to Servant—Negligence of Fellow-servant in Lower Grade of Employment—Liability of Master—Workmen's Compensation for Injuries Act, sec. 3, sub-sec. 5—Construction—Railway—“Person in Charge or Control of Engine”—Evidence—Findings of Jury.*]—Subsection 5 of sec. 3 of the Workmen's Compensation for Injuries Act, R.S.O. 1897, ch. 160, should receive a liberal construction in the interests of the workman.—An employer may be responsible for the negligence of an employee resulting in injury to another employee, although the one injured is in authority over the other.—The plaintiff was foreman of a railway yard of the defendants, and M. was his assistant and subject to his orders. In carrying out the plaintiff's orders, M. gave a wrong direction to the driver of the yard-engine, by reason of which the plaintiff was struck by the engine and injured. The engine-driver testified that he took his instructions from M.:—*Held* (LENNOX, J., dissenting), that there was reasonable evidence that M. was, on the occa-



sion in question, a person in charge or control of the engine, within the meaning of sub-sec. 5; and, upon the findings of the jury, in an action to recover damages for the plaintiff's injury, the defendants were responsible for the negligence of M.—Judgment of MULOCK, C.J. Ex.D., affirmed. *Martin v. Grand Trunk R.W. Co.*, 165.

See NEGLIGENCE, 1.

### MECHANICS' LIENS.

1. *Claims of Material-men — Contract between Owner and Contractors—Provision for Payment of Percentage of Contract-price under Progress Certificates—Statutory Direction for Deduction of Percentage from "Payments to be Made"—Retention for Benefit of Lien-holders — Mechanics and Wage-Earners Lien Act, 10 Edw. VII. ch. 69, secs. 6, 10, 11, 12, 15.*—Upon claims to enforce liens for materials furnished to contractors for the erection of houses, it appeared that, under the contract, eighty per cent. of the value of the work done, to be estimated at contract-prices, was to be paid, from time to time, on progress certificates, by the owner to the contractors; and a considerable sum became thus payable. By sec. 12 of the Mechanics and Wage-Earners Lien Act, 10 Edw. VII. ch. 69, twenty per cent. is to be deducted from "any payments to be made" on the contract; and the amount of such deduction is to

be retained for the benefit of lien-holders:—*Held*, that to the extent of twenty per cent. on payments made upon progress certificates, the owner was liable to lien-holders; and if, over and above the amount of these progress certificates, any sum ever became payable by the owner to the contractors, twenty per cent. of that also was available to lien-holders. Different considerations would apply if there had been no contract to pay except on fulfilment of the contract on the contractors' part.—Sections 6, 10, 11, 12, and 15 of the Act considered.—History of the legislation and review of the authorities.—*Russell v. French* (1897), 28 O.R. 215, approved and followed. — *Farrell v. Gallagher* (1911), 23 O.L.R. 130, and *McManus v. Rothschild* (1911), 25 O.L.R. 138, overruled in so far as anything decided in those cases is contrary to the above ruling. *Rice Lewis & Son Limited v. George Rathbone Limited*, 630.

2. *Registration of Claim—Proceedings by another Lienor — Mechanics Lien Act, 10 Edw. VII. ch. 69, sec. 24—"In the Meantime" — Preservation of Lien—Time.*—Liens are, for the purposes of the Mechanics and Wage-Earners Lien Act, 10 Edw. VII. ch. 69, divided into two classes: (1) liens for which a claim is not registered; and (2) liens for which a claim is registered. The lien is given



by sec. 6, and exists independently of the registration of a claim. Before registration, there are two courses open to a lienor: (a) he may omit to register a claim, in which case his lien will either lapse or be enforced by action at his own instance or that of others; or (b) he may register a claim, in which case his lien will lapse on the expiration of ninety days, or he must bring an action within a certain time or some one else must. And thus the lienor who registers a claim must be taken to have abandoned all relief but what he can obtain under sec. 24.—By sec. 24, it is provided that “every lien for which a claim has been registered shall absolutely cease to exist on the expiration of ninety days . . . unless *in the meantime* an action is commenced to realise the claim or in which the claim may be realised under the provisions of this Act. . . .”—*Held*, that the words “in the meantime” do not mean “between the time of registering the claim and the expiry of the time limited;” but any proceeding taken during the existence of the lien (at all events) is taken “in the meantime,” within the meaning of sec. 24, if taken before the expiration of the periods mentioned in that section.—History of the legislation and review of the authorities.—Order of the Local Master at Ottawa affirmed. *Eadie-Douglas v. Hitch & Co.*, 257.

## MEDICAL PRACTITIONER.

See PHYSICIANS AND SURGEONS.

## MINES AND MINERALS.

See EXECUTION.

## MISCHIEF.

See ANIMALS.

## MISCONDUCT.

See PHYSICIANS AND SURGEONS.

## MISTRIAL.

See EVIDENCE, 1.

## MONKEY.

See ANIMALS, 2.

## MORTGAGE.

See LIMITATION OF ACTIONS, 2.

## MUNICIPAL CORPORATIONS.

1. *Drainage—Extension of Existing System—Initiation of Proceedings—Report—Necessity for Petition—Inquiry—Liability—Natural Watercourses Incorporated in System—Municipal Drainage Act, 1910, sec. 77—Sufficiency of Outlet—Finding of Drainage Referee—Appeal.*—The judgment of the Drainage Referee dismissing an appeal from an assessment in respect of a proposed drainage work was affirmed.—*Per GARROW, J.A.*:—Where the work proposed is not the construction of a new drainage system, but merely the improvement and repair of an established system which, experience has proved, is defective, in that lands and

roads along its course are being flooded from year to year by the overflow of waters, for which that system provides no adequate or sufficient escape, the case falls within sec. 77 of the Municipal Drainage Act, 1910, 10 Edw. VII. ch. 90, as to "repairing upon report;" and a petition is unnecessary.—Effect of the amendment of sec. 75 of the former Act, by 6 Edw. VII. ch. 37, sec. 9, and *Sutherland-Innes Co. v. Township of Romney* (1900), 30 S.C.R. 495, *Township of Orford v. Township of Howard* (1900), 27 A.R. 223, and *In re Township of Rochester and Township of Mersea* (1901), 2 O.L.R. 435, considered. — Where small creeks, entitled in strictness to be called watercourses, have lost their natural character and become part of an artificial drainage system created under the drainage laws of the Province, the part of the system which was once a natural watercourse is entitled to no particular immunity, under the law, over the parts which are purely artificial. The whole must operate so as to discharge the waters which it gathers, at a proper and sufficient outlet.—*Re Township of Elma and Township of Wallace* (1903), 2 O.W.R. 198, and *McGillivray v. Township of Lochiel* (1904), 8 O.L.R. 446, distinguished.—Section 77 of the Act should not be given a narrow construction; and its provisions justified the assessment made against lands and roads in the

township of Orford in respect of a proposed extension of a former drainage work.—The contention that the proposed work did not improve the existing outlet or furnish a sufficient outlet was determined against the appellant by the Drainage Referee upon the facts, and the Court declined to interfere. — *Per MEREDITH, J.A.*:—The points raised upon the appeal involved questions of fact only; and the decision of the Referee should not be interfered with. *Re Township of Orford and Township of Aldborough*, 107.

2. *Expropriation of Land for Widening of Street* — "Due Compensation"—*Municipal Act*, 1903, sec. 437—*Arbitration and Award*—*Value of Land Taken*—*Injurious Affection of Land not Taken*—*Depreciation in Value*—*Change in Character of Street*—*Street Railway Lines*—*Local Improvement Assessment*.]—The city corporation, under a by-law, took, for the purpose of widening a street, ten feet from the front of a lot of land upon which stood a dwelling-house. Upon an arbitration, under the provisions of the Municipal Act, to fix the compensation to be paid to the claimant (land-owner) for the taking, the award gave the claimant: (1) a sum of money for the value of the land taken; (2) another sum for injuriously affecting the remainder of her land, by reason of the loss of a tree and the bringing of the

street line ten feet nearer to the house; and (3) another sum for injurious affection, by "depreciation caused by the change of the general character of the street:"—*Held*, that "due compensation" in sec. 437 of the Municipal Act, 1903, simply means a full indemnity in respect of all pecuniary loss by reason of the exercise of the powers of the corporation; and the only subjects of such pecuniary loss are: (1) the lands actually taken; and (2) the injury to the leasing or selling value of what is left. Assuming that the arbitrator intended in the second item to include all that tended to depreciate the value of the parcel retained by the claimant, there was nothing left capable of being reduced to a money basis; and the third item was improperly included in the award.—*Held*, also, that the arbitrator was right in (1) refusing to include in the award a further allowance because of a supposed intention on the part of the corporation to place a street railway upon the widened street; and (2) declining to entertain as an element of compensation the circumstance that the corporation were proceeding under the local improvement clauses of the Act, by virtue of which the claimant would be assessed for a portion of the cost of the widening. *Re Macdonald and City of Toronto*, 179.

3. *Local Option By-law—Repealing By-law* — "*Submission*

*to Electors*" — *Voting* — *Non-compliance with Provisions of Municipal Act, 1903—Violation of Secrecy of Ballot—Effect on Result—Sec. 204 of Act—Right of Council to Submit New By-law—Discretion—Mandamus — Direction — Declaratory Judgment—Jurisdiction.*]—Local option was adopted by a by-law of a town in January, 1906; and the town council submitted or purported to submit a repealing by-law to the electors on the 1st January, 1912. For the repealing by-law 1,268 ballots were cast and 1,393 against it:—*Held*, upon the evidence, that at the voting upon the by-law there was an entire disregard of many of the most important provisions of the Municipal Act, 1903, relating to voting at elections and on by-laws, and particularly of those affecting the secrecy of the ballot, and that it could not be said that the result of the voting was not affected, within the meaning of sec. 204 of the Act. —As to secrecy, the aim of the statute is not alone that the voter *can conceal* his vote, but that while voting he shall not be in a position to disclose how he votes. To ignore the observance of the latter requirement would be to enable the bribed voter to prove himself entitled to the bribe.—*Held*, that it was entirely within the discretion of the town council to determine whether they would or would not submit another repealing by-law; and the Court would not grant a mandamus or direction

to the council to submit a by-law.—*Held*, however, that the Court had jurisdiction to pronounce and should pronounce a judgment declaring that what took place on the 1st January, 1912, was not a *bonâ fide* submission of a repealing by-law, within the meaning of 6 Edw. VII. ch. 47, sec. 24 (O.); and that the submission and vote thereon should not stand in the way of the submission of a new by-law before 1915.—Review of the authorities. *Stoddart v. Town of Owen Sound*, 221.

4. *Prevention of Use of Buildings as "Stores" or "Manufactories"*—*Municipal Act*, 1903, sec. 541a — *By-law — Ladies' Tailoring Business*.]—A building in a city street used by the owner or tenant thereof as a dwelling-house for himself and his family, and also, during part of the year, for the purposes of a ladies' tailoring business, carried on by him in the manner described below, cannot be said to be used as a "store" or "manufactory," within the meaning of a city by-law passed pursuant to sec. 541a of the *Municipal Act*, 1903, as enacted by 4 Edw. VII. ch. 22, sec. 19, empowering the councils of cities to pass by-laws "to prevent, regulate and control the location, erection and use of buildings for laundries, butcher's shops, stores and manufactories;" RIDDELL, J., dissenting.—Judgment of MIDDLETON, J., reversed by a Divisional Court. — Order of Divisional

Court affirmed by the Court of Appeal. *City of Toronto v. Foss*, 264, 612.

5. *Prohibition of Erection of Apartment Houses on Residential Streets*—2 Geo. V. ch. 40, sec. 10—*City By-law — Permit before Statute — Building not Begun—"Location" — Revocation of Permit—Estoppel*.]—By the Ontario statute 2 Geo. V. ch. 40, sec. 10 (assented to on the 16th April, 1912), a clause (c) was added to sec. 541a of the *Municipal Act*, 1903, as enacted by sec. 19 of the *Municipal Amendment Act*, 1904, giving power to municipal councils, "in the case of cities having a population of not less than 100,000, to prohibit, regulate, and control the *location* on certain streets to be named in the by-law of apartment or tenement houses . . . ." On the 13th May, 1912, a by-law was passed by the plaintiffs' council forbidding the erection of apartment houses on certain named streets. The defendant, in May, 1911, had purchased a lot upon one of the streets named in the by-law, and in October, 1911, had begun the erection of a bungalow thereon. On the 31st January, 1912, he obtained from the proper officer of the plaintiffs a permit to erect an apartment house upon the same lot, to supersede the bungalow; but no work was done in pursuance of the new plan until July, 1912—after the passing of the statute and by-law, and notification



to the defendant of the withdrawal of the permit:—*Held*, that, giving the word “location” its primary and proper import, the statute and by-law forbade the *locus* being used for the purpose of putting an apartment house thereon; the “location” was not completed by the obtaining of the permit, coupled with the design or intention of the defendant; and the permit could not be regarded as an estoppel.—Judgment of BRITTON, J., reversed. *City of Toronto v. Williams*, 186.

See ANIMALS, 1—ASSESSMENT AND TAXES — HIGHWAY — LIQUOR LICENSE ACT.

### NAVIGABLE WATERS.

See WATER AND WATER-COURSES, 1.

### NEGLIGENCE.

1. *Death of Person Falling into Hold of Vessel—Master and Servant—Termination of Relation—Licensee—Duty of Owner of Premises.*]—The judgment of a Divisional Court, 24 O.L.R. 643, dismissing the action, was affirmed:—*Held*, per GARROW, J.A., that the plaintiff’s deceased husband was not, when he met his death, upon the defendants’ steamer in the course of his employment; and, so far as the action was based upon the relation of master and servant, it failed. He was not there as an invitee, nor in any higher position than that of a bare licensee; and the only duty

which the defendants owed him was not to deceive him by means of a trap, or to be guilty of any act of active negligence, of which on the occasion in question there was no reasonable evidence; the licensee must otherwise take the premises as he finds them.—*Per MEREDITH, J.A.*, that the deceased was a trespasser; and, in any view, the plaintiff had not proved a good cause of action against the defendants. *King v. Northern Navigation Co.*, 79.

2. *Parent Permitting Infant to Use Fire-arm — Injury to Playmate—Findings of Jury—Contributory Negligence of Infant Plaintiff—Application of Doctrine to Children.*]—The infant plaintiff, a boy of twelve, was accidentally injured by a shot from a gun fired by the defendant’s son, also twelve years old. In an action for damages for the injuries sustained, the jury found the defendant guilty of negligence in not having the gun, which had been lent to his son, removed from his house when he noticed it there, and that the injury to the infant plaintiff was occasioned by that negligence; but that the infant plaintiff was guilty of contributory negligence in passing in front of the gun, instead of behind it:—*Held*, upon the evidence, that the question of contributory negligence was properly left to the jury; that the infant plaintiff, having regard to his intelligence and knowledge of fire-arms, was capable of contri-

butory negligence; and that, upon the jury's finding of contributory negligence, the action must be dismissed.—The doctrine of contributory negligence in relation to children discussed and the authorities reviewed.—Judgment of BRITTON, J., reversed. *Moran v. Burroughs*, 539.

3. *Street Railway—Injury to Passenger—Electric Explosion—Evidence—Onus—Defective Condition of Controller—Inspection—Findings of Jury—Nonsuit—Judgment on Former Appeal.*]—Upon the second trial of this action, directed by the Court of Appeal, 25 O.L.R. 317, the jury found that the plaintiff's injuries were caused by the negligence of the defendants, such negligence consisting in using (upon their electric street-car in which the plaintiff was a passenger when injured) a rebuilt controller in a defective condition, and not properly inspected; that the motorman was guilty of negligence in not applying the brake when the electric explosion referred to in the evidence occurred; and that there was no contributory negligence:—*Held*, that there was sufficient evidence proper for the jury upon which they might reasonably find as they did.—*Per* GARROW, J.A.:—The accident was an unusual one—one that could not have happened if the controller had been in proper condition. It was under the care and management of the de-

fendants' servants. It had at one time, not long before the accident, become so worn out that it had to be rebuilt; and the onus, in the circumstances, was upon the defendants to shew that that had been properly done—an onus not discharged by the evidence which was given. And the evidence did not shew satisfactorily that such an inspection had recently been had as would probably have discovered the defects, if there were any.—*Scott v. London and St. Katherine Docks Co.* (1865), 3 H. & C. 596, 601, specially referred to.—*Per* MEREDITH, J.A.:—The defendants were not entitled to a nonsuit on the first ground upon which the action was based; that was settled adversely to the defendants, so far as the Court of Appeal was concerned, by the judgment in the former appeal. Upon the other branch of the case, there was evidence upon which reasonable men might find, as the jury did find, that the accident was caused by a defect in the controller which proper inspection would have discovered in time to have prevented the accident. *Fleming v. Toronto R.W. Co.*, 332.

*See* MASTER AND SERVANT — RAILWAY, 2, 3.

#### NEW TRIAL.

*See* CRIMINAL LAW, 1—EVIDENCE, 1.

**NONREPAIR OF HIGHWAY.***See* HIGHWAY.**NONRESIDENT'S LANDS.***See* ASSESSMENT AND TAXES, 3.**NONSUIT.***See* MASTER AND SERVANT, 1  
— NEGLIGENCE, 3.**NOTICE.***See* ASSESSMENT AND TAXES,  
3, 4.**OBSTRUCTION OF HIGHWAY.***See* HIGHWAY.**ONTARIO RAILWAY AND  
MUNICIPAL BOARD.***See* ASSESSMENT AND TAXES, 1.**OPINION EVIDENCE.***See* EVIDENCE, 1.**OVERHOLDING TENANT.***See* LANDLORD AND TENANT, 3.**PARENT AND CHILD.***See* GIFT, 1—NEGLIGENCE, 2.**PART PERFORMANCE.***See* VENDOR AND PURCHASER.**PARTIES.***See* CROWN — WATER AND  
WATERCOURSES, 1.**PASSENGER.***See* RAILWAY, 1.**PATENT FOR LAND.***See* CROWN.**PAYMENT INTO COURT.***See* COSTS.**PERJURY.***See* CRIMINAL LAW, 2.**PERMIT.***See* WATER AND WATER-  
COURSES, 2.**PETITION.***See* COMPANY, 2—EVIDENCE, 2.**PHYSICIANS AND SURGEONS.***College Council—Inquiry into  
Alleged Misconduct of Register-  
ed Practitioner—Ontario Medi-  
cal Act, R.S.O. 1897, ch. 176,  
secs. 33, 35, 36—10 Edw. VII.  
ch. 77—Proceedings before Com-  
mittee and Council—"Ascertain  
the Facts"—Necessity for Find-  
ing by Committee — Duty of  
Council — Decision upon Facts  
Found—Resolution of Council  
Directing Erasure of Name from  
Register—Appeal—Order upon  
—Further Inquiry by Council  
through Committee — Restora-  
tion of Name—Costs—Division-  
al Court — Final Court of Ap-  
peal—Authority of Previous De-  
cision—2 Geo. V. ch. 17, sec. 10  
(4).]—Where a statute gives  
power to a smaller body to do  
any particular act for a larger  
body—for example, a board of  
directors for the shareholders of  
a company—the larger body is  
incapable of doing that act.—  
By secs. 33 and 35 of the Ontario  
Medical Act, R.S.O. 1897, ch.  
176, as amended by 10 Edw. VII.  
ch. 77, upon the application of*

any four registered medical practitioners, an inquiry is to be made into the case of any person alleged to be liable to have his name erased from the register of the College of Physicians and Surgeons of Ontario, for infamous or disgraceful conduct in a professional respect. The inquiry is not to be *made* by the College Council, but *caused to be made*; and a standing committee is to be maintained for the purpose of making such inquiries. The Council "shall . . . ascertain the facts of such case by" this committee; and may act upon a written report of the committee. The Council, "on proof of such . . . infamous or disgraceful conduct, shall cause the name of such person to be erased from the register:"—*Held*, upon an appeal under sec. 36 of the Act from an order or resolution of the Council directing that the name of S. should be erased from the register, that it is the duty of the committee, upon the true construction of the statutory provisions above summarised, to ascertain and find the facts and report their finding to the Council; and it is then the duty of the Council to decide whether the facts found are such as to shew that the accused has been guilty of infamous or disgraceful conduct in a professional respect.—And *held*, in this case—the committee which made the inquiry not having ascertained and found and reported the facts to the Council—that the resolu-

tion of the Council could not stand so as to cause an effective erasure of the name of S. from the register.—And *held* (BRITTON, J., dissenting), that the proper order to make, under sec. 36 of the Act, was for an inquiry by the Council in the ordinary way, *i.e.*, by the standing committee—the members of the committee which made the inquiry being *functi*—and that pending the inquiry the name of S. should not be restored to the register, even if the Court had power to order restoration in the interval; and *semble*, *per* RIDDELL, J., it had not the power.—*Held*, as to costs, that, as all the proceedings in the way of taking evidence, etc., had been rendered useless by the error of the committee, the appellant, S., should have his costs of those proceedings paid by the Council; and he would also have been entitled to his full costs of the appeal, but for the faulty manner in which the appeal was brought before the Court; on that account, he should have no costs of the appeal, except a counsel fee to leading counsel; and the costs directed to be paid to the appellant should be set off against costs ordered in previous proceedings to be paid by him.—*Per* RIDDELL, J.:—Examination and discussion of various objections taken by the appellant to the proceedings by the committee and the Council. Some of these objections were adjudicated upon by RIDDELL, J., and by a Divisional Court, in



*Re Stinson and College of Physicians and Surgeons of Ontario* (1910-11), 22 O.L.R. 627; and the conclusions thereon should, upon reconsideration, be adopted. — *Quere*, per RIDDELL, J., whether the enactment of 2 Geo. V. ch. 17, sec. 10 (4), altered the law laid down in *Canadian Bank of Commerce v. Perram* (1899), 31 O.R. 116, and subsequent cases, that, as a final Court of appeal in certain cases, a Divisional Court is not bound by the decision of any other Divisional Court. *Re Stinson and College of Physicians and Surgeons of Ontario*, 565.

#### POLICE MAGISTRATE.

See CRIMINAL LAW, 3—MANDAMUS.

#### POLICE MAGISTRATES ACT.

See CRIMINAL LAW, 3.

#### POSSESSION OF LAND.

See LIMITATION OF ACTIONS.

#### PRACTICE.

See COMPANY, 2 — COSTS — CRIMINAL LAW, 4 — DIVISION COURTS — EVIDENCE, 2—JUDGMENT DEBTOR — MANDAMUS — SOLICITORS — SUPREME COURT OF CANADA—WRIT OF SUMMONS.

#### PRESUMPTION.

See CROWN.

#### PRINCIPAL AND AGENT.

1. *Agent's Commission on Sale of Land—Contract* — “Selling my Property”—*Procuring Purchaser Acceptable to Principal*—

*Agreement for Sale not Carried out.*—The plaintiff, who acted as a real estate agent, asked the defendant's wife if she wished to sell land standing in the defendant's name. She said, “If you bring me a purchaser, I will sell it.” The plaintiff found a purchaser, one H.; and an agreement of sale was signed by the defendant and H. After that, the defendant signed a writing by which he agreed to pay the plaintiff the usual commission “for selling my property.” H. refused to carry out the sale; and the plaintiff sued for the commission: — *Held* (BRITTON, J., dissenting), that what both parties meant by selling the property was the successful effort of the plaintiff to procure a purchaser acceptable to the defendant, this purchaser signing a contract acceptable to the defendant; and, therefore, the plaintiff was entitled to a commission.—“Sale” may properly be used as meaning an agreement for sale, even if it be not implemented by conveyance.—*Peacock v. Freeman* (1888), 4 Times L.R. 541, and *Robinson v. Reynolds* (1912), 3 O.W.N. 1262, distinguished.—*Mackenzie v. Champion* (1885), 12 S.C.R. 649, specially referred to.—Judgment of DENTON, JUN.CO. C.J., reversed. *Smith v. Barff*, 276.

2. *Agent's Commission on Sale of Land — Contract — Time-Limit — Sale Effected after Expiry — Introduction of Pur-*

*chaser by Agent.*]—The judgment of MIDDLETON, J., 26 O.L.R. 585, dismissing an action by a land agent to recover commission upon the sale of land for the defendants, was affirmed by a Divisional Court.—*Per MULOCK, C.J.Ex.D., and RIDDELL, J.*:—The plaintiff did not bring a purchaser within the time fixed by the contract of agency; and was, therefore, not entitled to commission. — *Per CLUTE, J.*:—Upon the evidence, it could not be said that the plaintiff brought a person who finally carried out the contract. *Sibbitt v. Carson*, 237.

3. *Agent's Commission on Sale of Land—Purchaser Found by Agent — Refusal to Carry out Purchase—Subsequent Purchase through another Agent—Causa Causans or Causa sine quâ non—Intention of Purchaser.*]—To determine whether a land broker is entitled to a commission on a sale of land, the test is, "Was the relation of buyer and seller really brought about by the act, however trifling, of the agent?" If so, he is entitled to commission, although the actual sale has not been effected by him. But if, notwithstanding an original introduction by the agent, his act is not the real and efficient cause of the sale, he cannot recover.—The plaintiff was employed by the defendant to find a purchaser for her land; he found a purchaser, J.; and an oral agreement of sale and purchase was made, but J. declared

it off. The defendant then placed the property in the hands of another agent. J.'s wife made inquiry of the new agent about the property, saying she had seen it; and, after negotiations with the new agent, a sale was made to J., on practically the same terms as had been arranged through the plaintiff. The trial Judge found that J. never abandoned his intention to buy:—*Held*, that it could not be considered that J.'s intention was to buy on the basis of the arrangement made through the plaintiff; his intention, if any, was to enter into new negotiations and buy if he could make satisfactory terms; and the case must be considered as if J. had no intention in the matter, but had simply refused to carry out his purchase.—And *held*, that, though the plaintiff's services were *causa sine quâ non*, they were not *causa causans* of the sale; and the plaintiff was not entitled to a commission.—Review of the authorities. — *Taplin v. Barrett* (1889), 6 Times L.R. 30, followed. — *Wilkinscon v. Alston* (1879), 41 L.T.R. 394, 48 L.J. Q.B. 733, explained and distinguished.—Judgment of DENTON, Jun. Co.C.J., reversed. *Travis v. Coates*, 63.

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#### PRIVILEGE.

*See SLANDER.*

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#### PRODUCTION OF DOCUMENTS.

*See EVIDENCE*, 2.

**PROHIBITION.**

See CRIMINAL LAW, 3—DIVISION COURTS.

**PROMISSORY NOTES.**

See BANKS AND BANKING, 1.

**PROVINCIAL LEGISLATURE.**

See ANIMALS, 1.

**PUBLICATION.**

See SLANDER.

**RAILWAY.**

1. *Breach of Statutory Duty*—*Neglect to Furnish Accommodation for Passengers at Station*—*Dominion Railway Act, secs. 284(1) (a), (7), 427(2)*—*Exposure of Passenger to Cold*—*Damages*—*Remoteness*—*Findings of Jury*—*Board of Railway Commissioners*—7 & 8 *Edw. VII. ch. 61, sec. 10.*]—*Held*, by BRITTON, J., at the trial, that the plaintiff had a right of action against the defendant railway company for breach of their statutory duty to provide suitable accommodation for passengers at a place where trains stopped to take up and set down passengers: *Dominion Railway Act, R.S.C. 1906, ch. 37, secs. 2 (31), 151 (g), 167 (1), (2), 258 (2), 284 (1), (7).*—*Held*, also, that the fact of the Board of Railway Commissioners for Canada having power to compel a railway company to provide a station at any place on the road where required, as proper accommodation for the traffic on the road, did not affect the question of the defendants' liability.—In an action for dam-

ages for injury to the plaintiff from exposure to cold while waiting for a train at a stopping-place where no station-house or shelter was provided, the jury found that an illness from which the plaintiff suffered was occasioned by reason of the absence of a station-house at the place referred to, and assessed the plaintiff's damages at \$1,500:—*Held*, that the damages were not too remote.—*Hobbs v. London and South Western R.W. Co.* (1875), L.R. 10 Q.B. 111, distinguished. — *McMahon v. Field* (1881), 7 Q.B.D. 591, *Grinsted v. Toronto R.W. Co.* (1894), 21 A.R. 578, and *Toronto R.W. Co. v. Grinsted* (1895), 24 S.C.R. 570, followed.—*Held*, by a Divisional Court, that where a wrongful act has occasioned exposure to the weather, and illness has resulted from such exposure, such illness is not to be regarded as due to an intervening cause.—The rule with regard to remoteness of damage is the same whether the damages are claimed in an action of contract or of tort. The inquiry is, what is the natural and probable consequence of the breach?—*Hobbs v. London and South Western R.W. Co.* (1875), L.R. 10 Q.B. 111, distinguished.—*McMahon v. Field* (1881), 7 Q.B.D. 591, and *The Notting Hill* (1884), 9 P.D. 105, specially referred to.—And *held*, affirming the judgment of BRITTON, J., that the plaintiff was entitled to recover for his loss of health occasioned by the defendants' default and neglect



and breach of statutory obligation; and that the jury had rightly measured the full amount of his damage: secs. 284 (1) (a), (7), and 427 (2), of the Railway Act, R.S.C. 1906, ch. 37.—The amendment to the Railway Act, by 7 & 8 Edw. VII. ch. 61, sec. 10, shews that, even if the Board of Railway Commissioners had a right to interfere, the action of the person aggrieved was not taken away. *Morrison v. Pere Marquette R.R. Co.*, 271, 551.

2. *Carriage of Live Stock and Person in Charge — Half Fare Privilege—Injury to Person — Negligence — Liability — Exemption—Special Contract with Shipper — Privity and Knowledge of Person Injured—Powers of Board of Railway Commissioners—Railway Act, R.S.C. 1906, ch. 37, secs. 284, 340.*—The judgment of LATCHFORD, J., 26 O.L.R. 437, was reversed by the Court of Appeal:—*Held* (MAGEE, J.A., and LENNOX, J., dissenting), that the plaintiff, travelling upon a freight train in charge of a horse, paying no fare himself, and having no ticket or other authorisation entitling him to be upon the train, could not be heard to deny that he was travelling under the provisions of the special contract which was in his possession, one of which provisions exempted the defendants from liability for injury to the person carried under it; and this, whether he had read it or not, and whether

or not his signature had been placed upon the back of it; and, therefore, he was bound by the provision referred to. — *Held*, also, that the Dominion Board of Railway Commissioners had power, under sec. 340 of the Railway Act, R.S.C. 1906, ch. 37, to authorise the form of special contract excluding liability of the defendants for death, injury or damage, whether caused by the negligence of the company or its servants or employees, or otherwise howsoever. — Sections 284 and 340 of the Railway Act, considered. *Robinson v. Grand Trunk R.W. Co.*, 290.

3. *Injury to Passenger Alighting from Vestibuled Train—Invitation to Alight—Descent after Train Set in Motion—Negligence of Railway Servants in Keeping Doors Closed—Negligence of Passenger—Wrongful Entry upon Pullman Car — Proximate Cause of Injury — Reasonableness of Passenger's Conduct—Findings of Jury and Trial Judge — Evidence.*—The plaintiff, taking a short night journey in a vestibuled train of the defendants, was seated at the rear end of a day-car, behind which was a Pullman sleeping car. When the train reached the plaintiff's station, he went out of the door of the day-car at the rear end upon the vestibule platform, and there, finding (as he said) that the doors for exit at that vestibule were closed, he went through the sleeping-car, and alighted from the train by



opening and using an exit-door at the rear end of that car; but this was after the train had started again; and the plaintiff was injured. It appeared that an exit-door at the front end of the day-car was open. In an action to recover damages for the injury suffered by the plaintiff, the jury found, upon conflicting evidence, that the exit-doors at the rear end of the day-car were closed, as the plaintiff said; and the trial Judge, with the assent of counsel on both sides, determined the other questions arising in the case, and gave judgment for the plaintiff:—*Held*, that, there being evidence to support the finding of the jury, it could not be set aside.—And *held* (MEREDITH, J.A., dissenting), that what the plaintiff did was, in the circumstances, reasonable; and that the defendants were liable.—*Keith v. Ottawa and New York R.W. Co.* (1902), 5 O.L.R. 116, specially referred to.—*Per* GARROW, J.A.:—Conceding that the plaintiff had no right, under his ticket, to enter the sleeping-car, he had at least a right to alight from the train; it was the neglect of the defendants' servants to open or to keep open the rear door which put him in the difficulty; it was no answer in law to say that, the train being again in motion, the invitation to alight was cancelled; allowance must be made for the natural desire of a passenger not to be carried beyond his destination.—*Per* MACLAREN, J.A.:—The defendants, having

negligently closed the plaintiff's natural means of getting off the train without notice to him, were guilty of negligence in starting it before he had sufficient time to get off by the means he adopted, which, in the circumstances, was not a negligent or unreasonable or improper way or method; and the injury he sustained was the direct result of such negligence.—*Per* MEREDITH, J.A.:—Upon the whole evidence, there was negligence on the part of the defendants in not affording reasonable means of alighting from the train at the rear vestibule, during the stop at the plaintiff's station; but that negligence was not the proximate cause of the plaintiff's injury; the accident was due to the want of ordinary care on the plaintiff's own part.—Judgment of MEREDITH, C.J. C.P., affirmed. *McDougall v. Grand Trunk R.W. Co.*, 369.

*See* CONTRACT — MASTER AND SERVANT, 2.

#### RATIFICATION.

*See* GIFT, 2.

#### RECOVERY OF LAND.

*See* LIMITATION OF ACTIONS.

#### REGISTERED PRACTITIONER.

*See* PHYSICIANS AND SURGEONS.

#### REGISTRAR.

*See* CRIMINAL LAW, 2.

#### REGISTRATION.

*See* MECHANICS' LIENS, 2.

**REGISTRY ACT.**

See LIMITATION OF ACTIONS, 2.

**RES JUDICATA.**

See COSTS.

**REVOCATION OF LETTERS OF ADMINISTRATION.**

See GIFT, 1.

**RIPARIAN OWNERS.**

See WATER AND WATERCOURSES, 1, 3.

**RULES.**

Con. Rule 162.]—See WRIT OF SUMMONS.

Con. Rule 425.]—See COSTS.

Con. Rules 448 *et seq.*, 490-492.]—See EVIDENCE, 2.

Con. Rules 489, 491, 492.]—See COMPANY, 2.

Con. Rules 902, 910.]—See JUDGMENT DEBTOR.

**SALE OF GOODS.**

*Warranty*—"Due to Calve."]  
—A cow bought by the plaintiff from the defendant was represented by the defendant as "due to calve" on a certain day:—*Held*, that the words did not in themselves import a warranty that the animal was in calf; and, there being no evidence that the defendant understood the words in that sense, or knew that the plaintiff did, or that the expression had any technical meaning, an action for breach of the alleged warranty was dismissed.—Judgment of the County Court of the County of Halton reversed. *Wilson v. Shaver*, 218.

**SALE OF LAND.**

See PRINCIPAL AND AGENT—VENDOR AND PURCHASER.

**SAVINGS BANK.**

See GIFT, 2.

**SCALE OF COSTS.**

See COSTS.

**SECRECY OF BALLOT.**

See MUNICIPAL CORPORATIONS, 3.

**SECURITIES.**

See BANKS AND BANKING, 2.

**SERVANT.**

See MASTER AND SERVANT.

**SERVICE OUT OF THE JURISDICTION.**

See WRIT OF SUMMONS.

**SET-OFF.**

See BANKS AND BANKING, 1.

**SETTLEMENT.**

See FRAUDULENT CONVEYANCE—GIFT, 1.

**SHARES.**

See BANKS AND BANKING, 3.

**SHEEP PROTECTION ACT.**

See ANIMALS, 1.

**SHIP.**

See NEGLIGENCE, 1.

**SLANDER.**

*Defamatory Words Spoken of Plaintiff in Reference to his Trade*—Speaking Brought about

*by Action of Plaintiff—Publication—Privilege—Malice — Jury—Damages—Quantum.]—Held*, upon the evidence, affirming the judgment of a Divisional Court, 26 O.L.R. 154, that the defamatory words spoken by the defendant of the plaintiff were not invited by the plaintiff with a view to an action against the defendant, though spoken by the defendant to detectives employed by the plaintiff to find out who was slandering him, and induced by false statements made by the detectives; and there was, therefore, publication of the words complained of; the defence of qualified privilege was not available to the defendant because of the actual malice found by the jury; and the damages (\$1,000) were not so excessive as to warrant the granting of a new trial. —*Per* MEREDITH, J.A.: — The plaintiff was not seeking a new defamation of his character with a view to recovering damages; he was seeking knowledge with a view to stopping the secret slanders which he neither desired nor had induced; and so, in this action, was not taking advantage of his own wrong, nor answered by a defence of leave and license. The defendant had, however, a right to stand upon the same ground as if the statements of the plaintiff's detectives had been true; and the words uttered would have been privileged but for the actual malice found. *Rudd v. Cameron*, 327.

### SOLICITORS.

*Taxation of Costs against Clients—Charges not Included in Tariff—Value of Services — Question of Fact—Evidence — Decision of Taxing Officer — Right of Court to Review — Appeal — Services of Solicitors as Directors of Company — Entries in Solicitors' Dockets—Increase in Items in Preparing Bills—Absence of Explanation — Payment by Commission — Broker's Charges — Costs of Taxation — Excessive Charges—Retaxation.]—Bills of costs were rendered by the solicitors to clients in respect of services in and about the incorporation of a company, sale of its bonds, preparation of mortgages to secure bondholders, acting as directors of the company incorporated, etc. The bills were rendered at about \$25,000; and, upon reference to the Senior Taxing Officer, were allowed at about half that sum. In making up the bills, the solicitors did not adhere to the charges previously made in their dockets, but increased the amounts. Upon appeal and cross-appeal to a Judge, the taxation was affirmed. Upon a further appeal and cross-appeal to a Divisional Court, a variation was made in favour of the solicitor upon one point. The clients then appealed to the Court of Appeal, and the solicitors cross-appealed:—*Held*, that, as the items complained of by the clients were not tariff items, the remuneration of the solicitors could be based only*

upon the value of their services, which was a question of fact to be determined by the Taxing Officer, upon proper evidence; and his conclusion thereon was open to review by the Court—the rule that the Court will not interfere with the Taxing Officer's discretion as to the amount of a taxable item in a bill of costs having no application in such a case.—2. That the solicitors were not entitled to be paid by their clients for their services as directors of the company.—3. That the Court should not interfere with the Taxing Officer's discretion as to the costs of the taxation.—4. *Per* GARROW, J.A., that the entries in the solicitors' dockets, while not conclusive, ought to be at least *prima facie* evidence of what the correct charges should be; and *per* MEREDITH, J.A., that the entries were not necessarily binding upon the solicitors; though, as against them, they were entitled to great weight, needing satisfactory explanation before treating them as mistakes in the way of undercharge; and no such explanation was given.—5. *Per* MEREDITH, J.A., that there was no justification for imputing to the clients a promise to pay by way of commission; and, short of a contract to pay, no such charge could lawfully be sustained. If in the conduct of a client's business a broker's services are needed, it is the solicitor's duty, with the client's assent, to have the work done by a competent

broker.—6. *Per* CURIAM, that the bills were excessive, and should be referred back to the Taxing Officer for retaxation of the items complained of by the clients. *Re Solicitors*, 147.

*See* COMPANY, 1.

### **SPECIFIC PERFORMANCE.**

*See* VENDOR AND PURCHASER.

### **STATED CASE.**

*See* CRIMINAL LAW, 4—HIGHWAY.

### **STATUTE OF LIMITATIONS.**

*See* LIMITATION OF ACTIONS.

### **STATUTES (CONSTRUCTION OF).**

*See* ASSESSMENT AND TAXES—EVIDENCE, 1.

### **STATUTES (REFERRED TO).**

13 Eliz. ch. 5 (Fraudulent Conveyances).

*See* FRAUDULENT CONVEYANCE.

R.S.O. 1897, ch. 119, sec. 30 (Law and Transfer of Property Act).

*See* ASSESSMENT AND TAXES, 4.

R.S.O. 1897, ch. 160, sec. 3, sub-sec. 5 (Workmen's Compensation for Injuries Act).

*See* MASTER AND SERVANT, 2.

R.S.O. 1897, ch. 176, secs. 33, 35, 36 (Ontario Medical Act).

*See* PHYSICIANS AND SURGEONS.

R.S.O. 1897, ch. 224, secs. 152, 209, 212, 217 (Assessment Act).

*See* ASSESSMENT AND TAXES, 4.

R.S.O. 1897, ch. 225, secs. 43, 45, 48, 48a (Municipal Institutions in Territorial Districts).

*See* ASSESSMENT AND TAXES, 1.

R.S.O. 1897, ch. 226, sec. 75 (Municipal Drainage Act).

*See* MUNICIPAL CORPORATIONS, 1.

R.S.O. 1897, ch. 245, sec. 54 (Liquor License Act).

*See* LIQUOR LICENSE ACT, 2.

R.S.O. 1897, ch. 256, sec. 20(1) (Factories Act).

*See* MASTER AND SERVANT, 1.



- R.S.O. 1897, ch. 271, sec. 9 (e) (Sheep Protection Act).  
*See* ANIMALS, 1.
- 3 Edw. VII. ch. 19, sec. 204 (O.) (Municipal Act).  
*See* MUNICIPAL CORPORATIONS, 3.
- 3 Edw. VII. ch. 19, sec. 437 (O.)  
*See* MUNICIPAL CORPORATIONS, 2.
- 3 Edw. VII. ch. 19, sec. 540, sub-sec. 2 (a) (O.)  
*See* ANIMALS, 1.
- 3 Edw. VII. ch. 19, sec. 541 (a) (O.)  
*See* MUNICIPAL CORPORATIONS, 4, 5.
- 3 Edw. VII. ch. 19, sec. 606 (O.)  
*See* HIGHWAY.
- 4 Edw. VII. ch. 22, sec. 19 (O.) (Amending Municipal Act).  
*See* MUNICIPAL CORPORATIONS, 4, 5.
- 4 Edw. VII. ch. 23, secs. 22, 65, 76, 77 (O.) (Assessment Act).  
*See* ASSESSMENT AND TAXES, 1.
- 4 Edw. VII. ch. 23, sec. 165 (2) (O.)  
*See* ASSESSMENT AND TAXES, 3.
- 4 Edw. VII. ch. 23, sec. 173 (O.)  
*See* ASSESSMENT AND TAXES, 2.
- 4 Edw. VII. ch. 23, secs. 176, 181 (O.)  
*See* ASSESSMENT AND TAXES, 4.
- 4 Edw. VII. ch. 24, sec. 5 (2) (O.) (Amending Municipal Institutions in Territorial Districts Act).  
*See* ASSESSMENT AND TAXES, 1.
- 5 Edw. VII. ch. 24, secs. 1, 3 (O.) (Amending Municipal Institutions in Territorial Districts Act).  
*See* ASSESSMENT AND TAXES, 1.
- 6 Edw. VII. ch. 31, secs. 51, 52 (O.) (Ontario Railway and Municipal Board Act).  
*See* ASSESSMENT AND TAXES, 1.
- 6 Edw. VII. ch. 37, sec. 9 (O.) (Amending Municipal Drainage Act).  
*See* MUNICIPAL CORPORATIONS, 1.
- 6 Edw. VII. ch. 47, sec. 13 (O.) (Amending Liquor License Act).  
*See* LIQUOR LICENSE ACT, 2.
- 6 Edw. VII. ch. 47, sec. 24 (O.)  
*See* MUNICIPAL CORPORATIONS, 3.
- R.S.C. 1906, ch. 29, sec. 88 (1) (Bank Act).  
*See* BANKS AND BANKING, 2.
- R.S.C. 1906, ch. 29, sec. 125.  
*See* BANKS AND BANKING, 3.
- R.S.C. 1906, ch. 37, secs. 2 (31), 151 (g), 167 (1), (2), 258 (2), 284 (1), (7), 427 (2) (Railway Act).  
*See* RAILWAY, 1.
- R.S.C. 1906, ch. 37, secs. 284, 340.  
*See* RAILWAY, 2.
- R.S.C. 1906, ch. 37, sec. 353.  
*See* CARRIERS.
- R.S.C. 1906, ch. 81, secs. 58, 59, 60 (Indian Act).  
*See* ASSESSMENT AND TAXES, 4.
- R.S.C. 1906, ch. 139, secs. 38 (c), 48 (e), 69, 71 (Supreme Court Act).  
*See* SUPREME COURT OF CANADA.
- R.S.C. 1906, ch. 144, sec. 21 (Wind-ing-up Act).  
*See* BANKS AND BANKING, 3.
- R.S.C. 1906, ch. 144, secs. 134, 135.  
*See* COMPANY, 2.
- R.S.C. 1906, ch. 146, sec. 171 (Criminal Code).  
*See* CRIMINAL LAW, 2.
- R.S.C. 1906, ch. 146, sec. 668.  
*See* CRIMINAL LAW, 3.
- R.S.C. 1906, ch. 146, sec. 708.  
*See* CRIMINAL LAW, 3.
- R.S.C. 1906, ch. 146, secs. 749 (a), 753.  
*See* MANDAMUS.
- R.S.C. 1906, ch. 146, sec. 1021.  
*See* CRIMINAL LAW, 1.
- 7 Edw. VII. ch. 5 (O.) (Manhood Suffrage Registration Act).  
*See* CRIMINAL LAW, 2.
- 7 Edw. VII. ch. 34, secs. 16, 17, 18, 21 (O.) (Companies Act).  
*See* COMPANY, 1.
- 7 & 8 Edw. VII. ch. 61, sec. 10 (D.) (Amending Railway Act).  
*See* RAILWAY, 1.
- 8 Edw. VII. ch. 21 (O.) (Mining Act).  
*See* EXECUTION.
- 9 Edw. VII. ch. 43, sec. 10 (O.) (Evidence Act).  
*See* EVIDENCE, 1.
- 9 Edw. VII. ch. 47 (O.) (Execution Act).  
*See* EXECUTION.
- 10 Edw. VII. ch. 32, sec. 62 (O.) (Division Courts Act).  
*See* DIVISION COURTS, 1.
- 10 Edw. VII. ch. 34 (O.) (Limitations Act).  
*See* LIMITATION OF ACTIONS.
- 10 Edw. VII. ch. 36, secs. 10, 18, 34 (O.) (Police Magistrates Act).  
*See* CRIMINAL LAW, 3.
- 10 Edw. VII. ch. 60 (O.) (Registry Act).  
*See* LIMITATION OF ACTIONS, 2.
- 10 Edw. VII. ch. 69, secs. 6, 10, 11, 12, 15 (O.) (Mechanics and Wage-Earners Lien Act).  
*See* MECHANICS' LIENS, 1.

- 10 Edw. VII. ch. 69, sec. 24 (O.)  
*See MECHANICS' LIENS, 2.*
- 10 Edw. VII. ch. 77 (O.) (Amending Ontario Medical Act).  
*See PHYSICIANS AND SURGEONS.*
- 10 Edw. VII. ch. 88, sec. 18 (O.) (Assessment Amendment Act).  
*See ASSESSMENT AND TAXES, 1.*
- 10 Edw. VII. ch. 90, sec. 77 (O.) (Municipal Drainage Act).  
*See MUNICIPAL CORPORATIONS, 1.*
- 10 Edw. VII. ch. 124, sec. 4 (O.) (City of Port Arthur Act).  
*See ASSESSMENT AND TAXES, 2.*
- 1 Geo. V. ch. 5 (O.) (Presumptions in Grants from the Crown).  
*See CROWN.*
- 1 Geo. V. ch. 6 (O.) (Bed of Navigable Waters Act).  
*See WATER AND WATERCOURSES, 1.*
- 1 Geo. V. ch. 37, secs. 75, 78 (1), (2) (O.) (Landlord and Tenant Act).  
*See LANDLORD AND TENANT, 3.*
- 2 Geo. V. ch. 8, sec. 7 (O.) (Mining Amendment Act).  
*See EXECUTION.*
- 2 Geo. V. ch. 55, sec. 13 (O.) (Amending Liquor License Act).  
*See LIQUOR LICENSE ACT, 1.*

### STATUTORY DUTY.

*See MASTER AND SERVANT, 1*  
 —RAILWAY, 1.

### STAY OF PROCEEDINGS.

*See WRIT OF SUMMONS.*

### STORE.

*See MUNICIPAL CORPORATIONS, 4.*

### STREET RAILWAYS.

*See MUNICIPAL CORPORATIONS, 2*—NEGLIGENCE, 3.

### SUBSCRIPTION FOR BONDS.

*See CONTRACT.*

### SUMMARY TRIAL.

*See CRIMINAL LAW, 3.*

### SUNDAY.

*See LIQUOR LICENSE ACT, 2.*

## SUPREME COURT OF CANADA.

*Right of Appeal to, from Judgment of Court of Appeal—Action in Nature of Suit in Equity—Judgment not Final—Supreme Court Act, secs. 38 (c), 48(e), 71—Leave to Appeal—Extension of Time—Special Circumstances.*—In this action, begun in 1906, the plaintiffs claimed specific performance of two agreements for the delivery of stock and bonds. The trial Judge decreed specific performance, and in default damages. On appeal to the Court of Appeal, this judgment was modified, but specific performance was decreed, by a judgment pronounced on the 21st April, 1908. The defendant company not delivering the stock or bonds, a reference for the assessment of damages was proceeded with, and a report made. The damages were reduced on appeal by a Judge of the High Court, and his order was affirmed by a judgment of the Court of Appeal, from which the defendant company appealed to the Supreme Court of Canada. The defendant company, in March, 1912, sought from the Court of Appeal leave to appeal to the Supreme Court of Canada from the judgment of the Court of Appeal of the 21st April, 1908:—*Held*, that the company might have appealed as of right, and without leave, within the sixty days provided by sec. 69 of the Supreme Court Act, R.S.C. 1906, ch. 139, from the judgment of April,

1908, although it was not a final judgment, the action being in the nature of a suit in equity, within the meaning of sec. 38 (c) of the said Act; and, if leave were necessary, application might have been made either to the Supreme Court of Canada or to the Court of Appeal under sec. 48(e); but, assuming that the Court of Appeal had power, under sec. 71, to extend the time and allow the appeal, the power should not be exercised, there being no "special circumstances" to justify it; MEREDITH, J.A., dissenting. *Nelles v. Hesselstine*, 97.

#### **SURVIVORSHIP.**

See GIFT, 2.

#### **TAX SALE.**

See ASSESSMENT AND TAXES, 2, 3.

#### **TAXATION OF COSTS.**

See SOLICITORS.

#### **TENANT FOR LIFE.**

See LANDLORD AND TENANT, 2.

#### **TERRITORIAL JURISDICTION.**

See DIVISION COURTS, 2.

#### **THEFT.**

See CRIMINAL LAW, 1, 3.

#### **TIMBER.**

See WATER AND WATER-COURSES, 2.

#### **TIME.**

See ASSESSMENT AND TAXES, 2, 4—CRIMINAL LAW, 4—HIGHWAY—MECHANICS' LIENS, 2—PRINCIPAL AND AGENT, 2—SUPREME COURT OF CANADA.

#### **TOLLS.**

See WATER AND WATER-COURSES, 2.

#### **TRADE-NAME.**

*Infringement — Colourable Imitation — Intention to Deceive — Injunction.*—One who has established a business reputation under a particular name has a right to restrain any one else from injuring his business by using that name or any other name only colourably different from that used or which is calculated to deceive.—The plaintiff, having for about sixteen years carried on the business of cleaning, pressing, and repairing clothing, under the name "My Valet," which was extensively advertised, was *held*, entitled to have the defendant restrained from carrying on a competing business, in the same city, under the name "My New Valet" or any other similar name only colourably different from the plaintiff's name—the evidence shewing a deliberate and in part successful attempt on the part of the defendant to trade unfairly and deceive the public into believing his business to be the plaintiff's business. — *Levy v. Walker* (1879), 10 Ch. D. 436, 447, and *Standard Paint Co. v. Trinidad*

*Asphalt Manufacturing Co.* (1911), 220 U.S. 446, followed.  
—*British Vacuum Cleaner Co. v. New Vacuum Cleaner Co.*, [1907] 2 Ch. 312, distinguished.  
“*My Valet*” *Limited v. Winners*, 286.

### TRANSFER OF SHARES.

See BANKS AND BANKING, 3.

### TREATY.

See WATER AND WATERCOURSES, 2.

### TRESPASS.

See ANIMALS, 1—WATER AND WATERCOURSES, 1.

### TRIAL.

See CRIMINAL LAW.

### TRUSTS AND TRUSTEES.

See WILL, 1.

### UNDUE INFLUENCE.

See GIFT, 1.

### UNITED STATES WAR DEPARTMENT.

See WATER AND WATERCOURSES, 2.

### UNORGANISED DISTRICT.

See ASSESSMENT AND TAXES, 1.

### VENDOR AND PURCHASER.

*Contract for Sale of Land—Absence of Written Memorandum—Part Performance—Subsequent Conveyance by Vendor to Another—Specific Performance—Purchaser Deprived of Remedy by Act of Vendor—Judicature Act, secs. 41, 58 (10)—*

*Damages in Lieu of Specific Performance.*] — The defendant made a bargain with the plaintiff for the sale of land to him. There was no memorandum in writing, but the plaintiff went into possession, and was in possession at the time of the trial of this action, which was brought for specific performance of the agreement. The purchase-price was \$2,800; the plaintiff paid \$500 down, and made monthly payments for sixteen months at the rate of \$20 a month. A deed and a mortgage were prepared, but were never executed. The defendant resold the property at an advance, and conveyed it, and so deliberately put it out of his power to convey to the plaintiff:—*Held*, that, although the contract would not before the Judicature Act have been enforceable at law, and was enforceable in equity only by the application of the doctrine of part performance, there was, by virtue of the Act, a binding contract in law as well as in equity; there was a breach of that contract by refusal to complete; and the plaintiff was entitled, in lieu of specific performance, to a return of the purchase-money paid and interest and to damages for the breach.—This was not by virtue of sec. 58, subsec. 10, of the Judicature Act, but by sec. 41, which gives to the High Court of Justice the jurisdiction possessed by the former Courts both of Law and Equity. — *Lavery v. Pursell* (1888), 39 Ch. D. 508, and *In*



re *Northumberland Avenue Hotel Co.* (1886), 33 Ch. D. 16, 2 Times L.R. 210, distinguished. — *Elmore v. Pirrie* (1887), 57 L.T.R. 333, and *Ferguson v. Wilson* (1866), 15 L.T.R. 230, L.R. 2 Ch. 77, specially referred to.— Distinction noted between this case and a case such as *Hipgrave v. Case* (1885), 28 Ch. D. 356, where the plaintiff by his own act disentitles himself to specific performance. *McIntyre v. Stockdale*, 460.

See PRINCIPAL AND AGENT.

### VERDICT.

See CRIMINAL LAW, 1.

### VOLUNTARY ASSUMPTION OF RISK.

See MASTER AND SERVANT, 1.

### VOLUNTARY SETTLEMENT.

See FRAUDULENT CONVEYANCE.

### VOTING.

See MUNICIPAL CORPORATIONS, 3.

### WARRANTY.

See SALE OF GOODS.

### WATER AND WATERCOURSES.

1. *Crown Grant of Land Bounded by Highway Running near Bank of Lake—Encroachment of Water upon Highway and Land beyond — Right of Grantee to Land Covered by Water—Fixed Boundary—Lease by Crown of Land Previously Granted now Covered by Water—Trespass—Riparian Owners—*

*Navigable Waters — Action — Parties—Attorney-General—Injunction—Damages.*—The original Talbot road, which formed the south-westerly boundary of the lands included in a grant from the Crown in 1825 of lot 178, Talbot road survey, to the predecessor of the plaintiff C., ran near the bank of Lake Erie. Along the shore of the lake, in that locality, the waters of the lake encroached upon the land, undermined the bank, caused it to subside, and then gradually washed it away. By reason of this encroachment of the lake, Talbot road at an early period grew dangerous and unsafe for public travel, until, about 1838, it was abandoned as a means of public travel, and a new road, for many years known as the Talbot road, was opened up and dedicated to public travel. This road continued to be the travelled road known as Talbot road, but the original Talbot road across the lake front had long since been washed away by the waters of the lake, and now those waters had advanced beyond where they were at the time of the original Talbot road survey; the waters had washed away the reserve left in front of the Talbot road, also the Talbot road itself and some rods of the front of the surveyed lots; so that so much of the land patented to C.'s predecessor, and now owned by him, as was above the waters of the lake, bordered on the waters, and not on the original Talbot road. In 1911 the Crown

made a lease to the defendant C. of the lands covered by the waters of Lake Erie in front of the plaintiff C.'s lot:—*Held*, by FALCONBRIDGE, C.J.K.B., upon the evidence, that the lands demised by the Crown were part of lot 178 north of the old Talbot road; and that, as the plaintiffs could gain no land by accretion, alluvion, or other cause, they should not lose by encroachment of the water upon their land, to which fixed termini were assigned by the grant from the Crown.—Review of the authorities. — There is no case in which it has been expressly held that a person in the position of the plaintiff C. loses his property because of the gradual encroachment of the water past the land in front of the road, past the road, and past the fixed boundary of the plaintiffs' land. — *Held*, also, that the statute 1 Geo. V. ch. 6 had no application; and that the Attorney-General was not a necessary party to the action.—*Held*, also, that the defendants had trespassed upon the plaintiffs' land, and that the plaintiffs were entitled to an injunction and damages. — The judgment of FALCONBRIDGE, C.J. K.B., was affirmed by a Divisional Court.—*Held*, per CLUTE, J., that the real question in the action was, whether, by accretion, the Crown became entitled to what was formerly a portion of lot 178, or whether the plaintiffs were entitled to that lot, to the exclusion of the defendants, under the original grant from

the Crown. The plaintiffs, claiming under a grant of the land which covered the site of the alleged trespass, continued to own that land, though covered with water, because the grantee from the Crown had no riparian rights, and the land could be well and definitely ascertained by metes and bounds. — *Per* RIDDELL, J.:—The case must be determined upon the reasons for the rules established in cases of gradual accretion. The boundary being fixed and not movable, no matter how far in the waters might come, the grantee of lot 178 did not lose his "propriety" in the land. The land in dispute, being now under part of a navigable lake, might be subject to the right of navigation; but that gave no right to the Crown to grant the soil or any interest in it; and, even if the plaintiffs were only riparian proprietors, they would be entitled to maintain this action and hold their judgment. — *Per* KELLY, J.:—The grantee could not be said to be a riparian proprietor, and his rights and liabilities differed in that respect from those of an owner of land bordering on navigable waters.—Review of the authorities. *Volcanic Oil and Gas Co. v. Chaplin*, 34, 484.

2. *International Boundary Stream — Unlawful Erection of Sheer-Boom by United States Company in Canadian Waters — Booming and Sorting Logs of Canadian Lumber Company — Payment for Services—Implied*

*Contract — Authority to Exact Tolls — Evidence — Onus — Ashburton Treaty — Jus Publicum — Act of State Legislation — Ultra Vires — Permit of United States War Department.*—The plaintiff company, incorporated under the laws of the State of Minnesota, by articles which purported to empower it to construct and maintain works on the Rainy River, to drive and sort logs passing through its booms, and to charge tolls for the services so rendered, constructed a portion of its works in 1889, and extended them in 1905, under a permit from the War Department of the Government of the United States. Piles were driven along the stream at places sometimes in the middle and at others near to but not in the middle of the stream, and booms connected by chains were secured in a continuous line along these piles up the stream, except where at one place towards the easterly end an opening for vessels was left; to the east of this opening was erected a sheer-boom, which ran in a north-easterly diagonal direction across and up the stream to the Canadian shore; at the lower or westerly end of the boom were cross-booms, sorting-gaps, and pockets, whereby logs could be held and sorted. The Rainy River runs between the Province of Ontario and the State of Minnesota, and under the Ashburton Treaty it is established as an international river, and its thalweg constitutes the boundary-line along its course between Canada and the United States. The defendant company in 1904 erected mills and booms on the northerly shore of the river, some distance below the westerly end of the plaintiff company's works, and in 1906 and 1907 conducted lumbering operations on its limits in the vicinity of Rainy Lake, watering its logs in common with those of other lumbermen, all of which, mixed together, floated down the lake and into the Rainy River. At this point, if uninterfered with, the logs would have distributed themselves over the whole river on their way down; but the plaintiff company's sheer-boom caused all the logs to pass to the south of and inside the main-boom, thereby preventing a substantial portion of them floating down in Canadian waters along the north side of the boom. The defendant company objected to the plaintiff company handling its logs; but the plaintiff company in the years 1906 and 1907, by means of its works, sorted and separated the logs passing into its sheer-boom, at least to some extent, and claimed payment for its services:—*Held*, that the plaintiff company was not entitled to recover, upon the ground either of an implied contract, or of legal authority to maintain the works and to charge and collect reasonable tolls for services rendered.—The sheer-boom, built wholly on the Canadian side of the

boundary-line had no legal authority for its existence. No legislation of a foreign power could entitle the plaintiff company to erect or maintain the sheer-boom, and by means of it to divert the property of a Canadian citizen from Canada into the United States, and there to cause it to pass into the custody and control of a foreign corporation. If a person wrongfully takes possession of a chattel of another, and, whilst in such possession, alters, improves, or otherwise deals with it, he is not entitled to payment for such services.—Even if the plaintiff company were otherwise entitled to recover for services in respect of logs lawfully in its possession, inasmuch as the confusion was caused by the unlawful acts of the plaintiff company, the onus was upon it to shew affirmatively the quantity of the defendant company's logs which lawfully came into its possession; there was no evidence from which this could be shewn; and, therefore, the plaintiff company could not recover.—In the absence of authority to exact tolls, or in the absence of a contract, express or implied, on the part of users of improvements on a highway to pay tolls, the person erecting such improvements has no right to exact tolls from the users. The principle is the same whether the public way be on the water or on the land; and here, in spite of the illegal works on the river, it remained *publici juris*.—The

provision in the plaintiff company's charter purporting to entitle it to impose tolls or other charges was *ultra vires* the State Legislature and null and void; and nothing in the permit of the War Department authorised the imposition of tolls or other charges. *Rainy Lake River Boom Corporation v. Rainy River Lumber Co.*, 131.

3. *Marsh Lands — Passage over Adjacent Lands — Access to Deep Water — Proprietary and Riparian Rights — Ashbridge's Bay — Evidence.*]—The judgment of a Divisional Court, 23 O.L.R. 365, was affirmed; MACLAREN, J.A., and CLUTE, J., dissenting. — *Per* MOSS, C.J.O.:—Upon the evidence, and without the aid of what is recorded in the publications referred to by MIDDLETON, J., in the Court below, the plaintiff's property, comprised within the conveyances and grants under which he claims, is now and always has been marsh, and nothing but marsh; and between it and the artificial channel through which he seeks access as riparian owner there is land of a like character.—*Per* MEREDITH, J.A.:—The statements contained in local private publications, relied on in the Court below, were not evidence. But, upon the whole evidence adduced at the trial, it was impossible to find that the waters to which the plaintiff's land extended were navigable; and the onus of proof that they were



was upon the plaintiff. *Merritt v. City of Toronto*, 1.

See CROWN—MUNICIPAL CORPORATIONS, 1.

### WILL.

1. *Construction — Absolute Gift to Daughter — Restriction — Discretion of Trustee — Invalidity — Further Restriction against Encroachment during Coverture — Validity — “I Wish” — Obligatory Import — “Settled upon herself” — Extended Meaning of.*]—The Court of Chancery has always leaned against the postponement of vesting or possession or the imposition of restrictions on an absolute vested interest. In a will, a sum of money cannot be given absolutely, coupled with a direction that the trustee of the money is to exercise a discretion as to the times and manner of payment. Such a scheme can be carried out effectively only by making the gift or legacy entirely dependent on the discretion of the trustee, or by means of a gift over to some other beneficiary.—*Wharton v. Masterman*, [1895] A.C. 186, *In re Johnston*, [1894] 3 Ch. 204, *Re Rispin* (1911), 25 O.L.R. 633, 636, and *In re Rispin, Canada Trust Co. v. Davis* (1912), 46 S.C.R. 649, followed.—A testator gave to his daughter, on her attaining twenty-one, and after provision being made for his widow, one-fourth of the remainder of his estate, with the proviso that, if the trustees should think it unde-

sirable for any reason that the share should be paid, they might defer the payment of the whole or any part to such time or times as they might think best, and in the meantime pay only the income to the daughter:—*Held*, that the restriction was inoperative.—In a later clause of the will, the testator said: “I wish all my money that my daughter . . . may inherit from me should be settled upon herself so that in the event of her marriage it will be impossible for her or her husband to encroach upon the same:”—*Held*, that this clause might well stand with and modify the earlier clause: the effect being that the money representing the daughter’s share of the estate was to be given to her as her own absolutely, provided only that during coverture she should enjoy it to her separate use and so that it should not be encroached upon by her or her husband during coverture; after coverture the restriction would end, and she would have it as if unmarried.—*Re Hutchings to Burt* (1888), 59 L.T.R. 490, *In re Fearon* (1897), 45 W.R. 232, and *In re Bown* (1884), 27 Ch.D. 411, distinguished.—*Held*, also, that the words “I wish” carried an obligatory import and were sufficient to create a trust.—*Held*, also, that the words “settled upon herself” meant that there should be a trustee and a proper conveyance to him, to be settled by the Master or a con-

veyancing counsel. *Re Hamilton*, 445.

2. *Construction — Bequest of Personalty to Widow — Life Interest with Power to Encroach upon Capital for Maintenance.*]

—The testator made his will in June, 1909, and died in August, 1911; there was no change in his financial circumstances in the interval. He left a widow and grown-up children — married and doing for themselves. His wife was, at the date of the will, weak and with failing eyesight; in 1912, she was old, infirm, and stone-blind. His estate consisted of land, with house and its belongings, and notes, mortgages, and money amounting to about \$7,000. He gave the whole of his property, real and personal, to his wife for life; after her death, the house and furniture, live stock and chattels, to one of his daughters; and after the wife's death legacies to various sons, amounting in the whole to \$3,200—the legacies to be paid forthwith “if there is sufficient funds to pay the same;” and, if not, a corresponding deduction was to be made in every case. All the residue of the estate was given among the daughters:—*Held*, that the widow took a life estate and interest in all the property, with an implied contingent power to encroach on the capital for the purposes of maintenance: this was a fair and reasonable conclusion to be drawn from the language of the will, construed in the light of the

surrounding facts known to the testator when he made his will and at the time of his death.—*Re Dixon* (1912), 56 Sol. J. 445, and *In re Holden* (1888), 57 L.J. Ch. 648, distinguished.—*In re Thomson's Estate* (1879-80), 13 Ch.D. 144, 14 Ch.D. 263, followed.—Judgment of MULLOCK, C.J.Ex.D., varied. *Re Johnson*, 472.

See GIFT.

### WINDING-UP.

See BANKS AND BANKING, 3—COMPANY, 2—EVIDENCE, 2.

### WITNESSES.

See EVIDENCE.

### WORDS.

“*And the Products thereof.*”]

—See BANKS AND BANKING, 2.

“*Ascertain the Facts*”]—See PHYSICIANS AND SURGEONS.

“*Channel.*”]—See CROWN.

“*Detached Dwelling-house.*”]—See DEED.

“*Disposal.*”]—See LIQUOR LICENSE ACT, 2.

“*Due Compensation.*”]—See MUNICIPAL CORPORATIONS, 2.

“*Due to Calve.*”]—See SALE OF GOODS.

“*Expert.*”]—See EVIDENCE, 1.

“*Found Running at Large.*”]—See ANIMALS, 1.

“*He who Seeks Equity must Do Equity.*”]—See ASSESSMENT AND TAXES, 4.

“*I Wish.*”]—See WILL, 1.

“*In the Meantime.*”]—See MECHANICS' LIENS, 2.

“*Judicial Proceeding.*”]—See CRIMINAL LAW, 2.

“*Known.*”]—See ASSESSMENT AND TAXES, 3.

“*Location.*”]—See MUNICIPAL CORPORATIONS, 5.

“*Manufactories.*”] — See MUNICIPAL CORPORATIONS, 4.

“*Other and Extrinsic Evidence.*”]—See DIVISION COURTS, 1.

“*Payments to be Made.*”]—See MECHANICS’ LIENS, 1.

“*Person in Charge or Control of Engine.*”]—See MASTER AND SERVANT, 2.

“*Products of the Forest.*”]—See BANKS AND BANKING, 2.

“*Public Place.*”]—See LIQUOR LICENSE ACT, 1.

“*Satisfaction of all the Causes of Action.*”]—See COSTS.

“*Selling my Property.*”]—See PRINCIPAL AND AGENT, 1.

“*Settled upon herself.*”] — See WILL, 1.

“*Stores.*”] — See MUNICIPAL CORPORATIONS, 4.

“*Submission to Electors.*”]—See MUNICIPAL CORPORATIONS, 3.

“*Verdict.*”] — See CRIMINAL LAW, 1.

“*Wholesale Purchaser.*”] — See BANKS AND BANKING, 2.

#### WORKMEN'S COMPENSATION FOR INJURIES ACT.

See MASTER AND SERVANT, 2.

#### WRIT OF POSSESSION.

See LANDLORD AND TENANT, 3.

#### WRIT OF SUMMONS.

Service out of the Jurisdiction

—Con. Rule 162 (e), (h)—Contract—Place of Payment or Performance—Assets in Ontario—Debts Owing to Defendant—Resort to Domicile of Defendant—Discretion — Convenient Forum—Stay of Proceedings.]—The action was founded upon an oral agreement made in the Province of Quebec, subsequently confirmed by the plaintiff company by a letter written in Ontario, where its place of business was, to the defendant company at its place of business in Quebec. According to the law of Quebec, if no place of payment is expressly or impliedly indicated by the contract—and here there was none—payment must be made at the domicile of the debtor:—*Held*, upon an application to set aside an order for service in Quebec of the writ of summons in an action brought in Ontario to enforce payment, that payment under the contract was to be made in Quebec; it was not enough that payment might well be made or the contract be performed within Ontario; and the case did not fall within clause (e) of Con. Rule 162.—Service of the writ might properly be allowed under clause (h), for the defendant company had assets in Ontario, of the value of more than \$200, which might be rendered liable to the satisfaction of the judgment — although the assets shewn were merely debts, which could not be reached by ordinary execution. — *Kemerer v. Watterson* (1910), 20 O.L.R. 451, followed.

—The normal course is, however, to require resort to the domicile of the defendant, particularly in the case of contracts entered into at the domicile and to be there performed.—*Sirdar Gurdyal Singh v. Rajah of Faridkote*, [1894] A.C. 670, followed.—The jurisdiction of the Ontario Court to entertain an action where the writ is served abroad is to be determined by the Court upon the terms of Con. Rule 162; but the Court has a discretion; and in this case, where the defendant was resident in Quebec, the Quebec Court was a convenient forum, the contract was made in Quebec and was to be interpreted according to the laws of Quebec, the defendant's assets were all substantially within that Province, and the Ontario Court acquired jurisdiction only by the accident of residence within Ontario of a debtor of the defendant, it was a sound exercise of discretion to say that the plaintiff should be compelled to resort to the Quebec forum; and an order was made staying all proceedings in this action, upon the service made in Quebec, until after the conclusion of any action which the plaintiff might bring in that Province.—Review of the recent English cases. *J. J. Gibbons Limited v. Berliner Gramophone Co. Limited*, 402.















